SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1389

EMIL LUSTIG, ALIAS DR. EDWARD E. FISHER, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court

Cr. 3829

THE UNITED STATES

vs.

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER

Docket Entries

1946

Apr. 2—Indictment for making engraving, print and impressions of obligations of the United States, filed.

Apr. 2—Notice of Allocation of case to Camden, N. J. filed.

Apr. 4—Ordered Bench Warrant issue for each defendant (Madden).

Apr. 5—Emil Lustig—Plea—Not Guilty—ordered bail fixed at $10,000 and ordered committed in default (Madden).

Apr. 5—Thomas Edward Reynolds—Plea—Not Guilty— ordered bail fixed at $7,500 and ordered committed in default (Madden).

Apr. 9—Emil Lustig—Warrant for arrest, returned executed (Madden).

Apr. 9—Emil Lustig—Commitment to County Jail returned executed and filed.

Apr. 9—Thomas Edward Reynolds—Warrant for Arrest, returned executed and filed.

Apr. 9—Thomas Edward Reynolds—Commitment to County Jail returned executed and filed.

Apr. 24—Petition in Support of Motion to Suppress Evidence filed.

Apr. 26—Hearing of Notice to suppress Evidence—Motion denied (Madden).

Apr. 29—Trial moved before Hon. Thomas M. Madden, Judge and jury.

Apr. 29—On Motion of Grover Richman, Jr., Asst. U. S. Attorney Ordered Inds. 3829c and 3875c consolidated for purpose of trial.

Apr. 29—Motion by Mr. Auerbach for judgment of acquittal in favor of defendant Thomas Edward Reynolds—motion denied (Madden).

Apr. 29—Verdict—Emil Lustig—Count 1, Guilty—Count 2, Guilty—Count 3, Guilty.

Apr. 29—Verdict—Thomas Edward Reynolds—Count 1, Guilty—Count 2, Guilty—Count 3, Guilty. Mr. Richman moved for sentence of both defendants.

1946

Apr. 29—Sentence—Emil Lustig—5 years on the Indictment (Madden).

Apr. 29—Sentence—Thomas Edward Reynolds—1 year and 1 day on the Ind. (Madden).

Apr. 30—Emil Lustig—Judgment and Commitment, filed (Madden).

Apr. 30—Thomas Edward Reynolds—Judgment and Commitment, filed (Madden).

May 7—Emil Lustig—Notice of Appeal, filed.

May 8—Copy of Notice of Appeal sent together with Docket Entries to William P. Rowland, Clerk C. C. A. and Copy of Notice of Appeal to U. S. Atty.

2 May 16—Thomas Edward Reynolds—Judgment and Commitment returned executed.

June 4—Emil Lustig—Application for permission to enter upon Service of Sentence pending appeal, filed.

Emil Lustig—Order granting permission to appellant to enter upon service of Sentence Pending Appeal, filed (Madden).

June 13—Stipulation extending time to settle and file record on appeal to and including August 5th, 1946, filed (Madden).

July 1—Commitment returned executed, filed.

Aug. 2—Order of Designation, filed.

3 In the District Court of the United States for the District of New Jersey

No. 3829c—18 U. S. C. Sec. 264

UNITED STATES OF AMERICA

vs.

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER AND THOMAS EDWARD REYNOLDS, ALIAS JOSEPH BINSTOCK

Indictment

Filed April 2, 1946

The Grand Jury duly impaneled on the 4th day of December in the year 1945 charges:

Count 1

That on or about the 10th day of March 1946, in the City of Camden and State and District of New Jersey and within the

jurisdiction of this Court, the said Emil Lustig, alias Dr. Edward E. Fischer and Thomas Edward Reynolds, alias Joseph Binstock, not under the authority or direction of the Secretary of the Treasury or other proper officer of the United States did unlawfully and feloniously print, make, and execute, cause to be printed, made, and executed, and aid in printing, making, and executing an engraving, print and impression in the likeness of a true and genuine obligation of the United States, and parts thereof, to wit: A Federal Reserve Bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania, of the denomination and value of $100.00, the face and back of which said obligation of the United States are of the following tenor and effect to wit:

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4 100 Federal Reserve Note 100

THE UNITED STATES OF AMERICA

C00845384A 3

This note is legal tender for all debts Public and private, and is redeemable in lawful money at the United States Treasury, or at any Federal Reserve Bank.

3 Thesaur Amer

(Portrait of Franklin) (Seal)

Series of 1934 ONE HUNDRED

Septent Sigil

The Federal Reserve Bank of Philadelphia, Pa.

C Series of 1934

Washington, D. C. B4 3

3 C00845384A

W. A. Julian Henry Morgenthau, Jr.

Treasurer of the United States Secretary of the Treasury

WILL PAY TO THE BEARER ON DEMAND

100 100 ONE HUNDRED DOLLARS 100 100

---

100 THE UNITED STATES OF AMERICA 100

(Vignette of building)

INDEPENDENCE HALL

100 100

ONE HUNDRED DOLLARS

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count II

That on or about the 10th day of March in the year 1946, in the City of Camden and State and District of New Jersey and within the jurisdiction of this Court, the said Emil Lustig, alias Dr. Edward E. Fischer and Thomas Edward Reynolds, alias Joseph Binstock, not under the authority or direction of the Secretary of the Treasury or other proper officer of the United States did unlawfully and feloniously print, make, and execute, cause to be printed, made and executed, and aid in printing, making, and executing an engraving, print, and impression in the likeness of a true and genuine obligation of the United States, and parts thereof, to wit: A Federal Reserve Bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania, or a silver certificate of the United States, the exact identity of said note being to the Grand Jurors unknown, of the denomination and value of $10.00, the back of which said obligation of the United States is of the following tenor and effect to wit:

TEN (10) THE UNITED STATES OF AMERICA TEN (10)

(Vignette of building)
U. S. Treasury

U. S. TREASURY
TEN (10) TEN DOLLARS TEN (10)

---

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count III

That on or about the 10th day of March in the year 1946, in the City of Camden and State and District of New Jersey and within the jurisdiction of this Court, the said Emil Lustig, alias Dr. Edward E. Fischer and Thomas Edward Reynolds, alias Joseph Binstock, did unlawfully and feloniously have in their control, custody, and possession the following:

1. An engraving, print, and impression of the face of a Federal Reserve Bank Note of the denomination and value of $100.00, which said engraving, print, or impression is more particularly

set forth and described in Count I of this indictment and is made a part hereof.

6 2. An engraving, print, and impression of the back of a Federal Reserve Bank Note of the denomination and value of $100.00, which said engraving, print, or impression is more particularly set forth and described in Count I of this indictment and is made a part hereof.

3. An engraving, print, and impression of the back of a Federal Reserve Bank Note or a Silver Certificate of the United States, the exact identity of said impression being to the Grand Jurors unknown, of the denomination and value of $10.00, which said engraving, print, or impression is more particularly set forth and described in Count II of this indictment and is made of part hereof.

4. A wooden press.

5. A package of one hundred sheets of bond paper.

6. Four packages containing one hundred sheets each of bond paper.

With intent to use those things herein before particularly described, and to suffer the same to be used in forging and counterfeiting obligations of the United States and parts thereof; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

A true bill.

ROBERT S. WEIBLE, *Foreman.*

Edgar H. Rossbach,
EDGAR H. ROSSBACH,
United States Attorney.

[File endorsement omitted.]

7 In United States District Court

[Title omitted.]

Petition in support of motion to suppress evidence

Now come the defendants, Emil Lustig, alias Dr. Edward E. Fischer, and Thomas Edward Reynolds, alias Joseph Binstock, and state and allege as follows:

By indictment filed the 2nd day of April 1946, in the District of New Jersey, we were indicted for violating Title 18, Section 264 of the United States Code and the acts amendatory thereto and the regulations duly promulgated thereunder.

We interposed a plea of "not guilty" to the said charge.

On or about the 10th day of March 1946, Emil Lustig, and Thomas Edward Reynolds state that they were lawfully in the premises in their room in the Walt Whitman Hotel, located at Broadway and Cooper Streets in the City and County of Camden and State of New Jersey. That upon entering the premises about 6:30 P. M., Emil Lustig and Thomas Edward Reynolds were confronted by three men, one now known to them to be Norwood Green, an agent of the Treasury Department or the Secret Service Department of the United States Government. That the said Norwood Green and the other two men accompanying him questioned the defendants. It was later learned that the two men accompanying Norwood Green were detectives of the City of Camden, New Jersey. At about 7:00 P. M. of the same day, Emil Lustig and Thomas Edward Reynolds were placed under
8 arrest by the detectives of the City of Camden, and the Federal agent.

All of this was done without a search warrant. Our premises were seized and without a warrant. We demanded to see a warrant, and they had none. The said officers, without a warrant, seized the following: two boards, two bolts, some washers, some Pearson's creoline, some water colors, some paper blotters, a few small empty bottles, two metal pans, some brown business envelopes, and two wooden sticks, one square and one round, together with two packages of white paper.

The said agents had no right to enter our premises and make a search and place us under arrest without a warrant. We, therefore, claim that our rights were invaded in the seizure of the items aforementioned, and we ask and pray that such evidence if it is intended to be used against us, obtained without a lawful search warrant be suppressed, as our rights under the provisions of the 4th and 5th Amendments to the Constitution have clearly been violated, and we respectfully pray for the following relief:

That all such evidence be excluded upon the trial of the action and that this Honorable Court now makes its order to suppress.

Dated Camden, New Jersey, April 24th, 1946.

Emil Lustig,
EMIL LUSTIG,
Petitioner.

Thomas Edward Reynolds,
THOMAS EDWARD REYNOLDS,
Petitioner.

9 [Duly sworn to by Emil Lustig and Thomas Edward Reynolds; jurat omitted in printing.]

10 District Court of the United States, District of New Jersey

No. 3829c—Criminal Indictment in three counts for violation of U. S. C., Title 18, Sec. 264

UNITED STATES

v.

EMIL LUSTIG

Judgment and commitment

Filed April 30, 1946

On this 29th day of April 1946, came the United States Attorney, and the defendant Emil Lustig appearing in proper person, and by counsel.

The defendant having been convicted on verdict of Guilty of the offense charged in the Indictment in the above-entitled cause, to wit: Making engraving, print, and impression of obligations of the United States and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Five Years on the Indictment.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) THOMAS M. MADDEN,
United States District Judge.

[File endorsement omitted.]

13 In United States District Court

Notice of appeal to

[Title omitted.]

Emil Lustig, now confined in the Camden County Jail, Camden, New Jersey. Represented by Carl Auerbach, Esq., having offices at 116 North 7th Street. Emil Lustig charged on two separate indictments with making engraving, print and impression of obligations of the United States, said indictment bearing the number 3829c; and making engraving, print and impression of obligations of the United States, said indictment bearing number 3875c. Was

convicted on April 29, 1946, and sentenced to a term of five years under the first indictment, and three years under the second indictment, to be served consecutively, and is now confined in the Camden County Jail at Camden, New Jersey.

1. The above-named appellant, hereby appeals to the United States Circuit Court of Appeals for the Circuit from the sentence above mentioned on the grounds set forth below.

Pursuant to Rule V. I hereby serve notice that I do not elect to enter upon the service of the sentence pending appeal

EMIL LUSTIG, *Appellant.*

Dated May 6, 1946.

GROUNDS OF APPEAL

1. The District Court in the trial of this cause refused to allow defense counsel to ask a Government witness questions with regard to the similitude of certain evidence produced by the Government to United States currency.

2. The District Court below refused to suppress certain evidence produced by the Government in the trial of this cause upon petition to suppress and objection to introduction in evidence timely made.

14 [Clerk's certificate to foregoing transcript omitted in printing.]

15 In United States District Court

Cr. 3875c

THE UNITED STATES

vs.

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER AND THOMAS EDWARD REYNOLDS, ALIAS JOSEPH BINSTOCK

Docket Entries

1946

Apr. 24—Indictment for having possession and control of print and impression of obligations of the United States, filed Apr. 23, 1946.

Apr. 24—Notice of Allocation of case to Camden, N. J., filed.

Apr. 26—Emil Lustig—Plea—Not guilty.

Apr. 26—Thomas Edward Reynolds—Plea—Not guilty.

Apr. 29—Trial moved before Hon. Thomas M. Madden, Judge, and jury.

1946

Apr. 29—On motion of Grover Richman, Jr., Asst. U. S. Atty. Ordered Inds. 3829c and 3875c consolidated for purposes of trial (Madden). Motion by Mr. Auerbach for judgment of acquittal in favor of defendant, Thomas Edward Reynolds—Motion Denied (Madden).

Apr. 29—Verdict—Emil Lustig—Count 1, Guilty—Count 2, Guilty.

Apr. 29—Verdict—Thomas Edward Reynolds—Count 1, Guilty—Count 2, Guilty—Mr. Richman moved for sentence of both defendants.

Apr. 29—Sentence—Emil Lustig—3 years on the Indictment, to run consecutively with the sentence imposed on Ind. 3829c (Madden).

Apr. 29—Sentence—Thomas Edward Reynolds—Imposition of sentence suspended and Probation for 5 years, said Probation to commence at the expiration of the sentence imposed on Ind. 3829c (Madden).

Apr. 30—Emil Lustig—Judgment and Commitment, filed (Madden).

Apr. 30—Thomas Edward Reynolds—Judgment, filed (Madden).

May 7—Emil Lustig—Notice of Appeal, filed (see Cr. 3829c).

May 8—Copy of Notice of Appeal together with Docket Entries sent to William P. Rowland, Clerk C. C. A. and Copy of Notice of Appeal sent to U. S. Atty.

June 4—Emil Lustig—Application for permission to enter upon Service of Sentence pending appeal, filed (see Cr. 3829c for paper).

Emil Lustig—Order granting permission to appellant to enter upon service of Sentence Pending Appeal, filed (Madden) (see Cr. 3829c for paper).

June 13—Stipulation extending time to settle and file record on Appeal to and including August 5th, 1946, filed (Madden) (see Cr. 3829c).

July 1—Commitment returned executed, filed.

Aug. 2—Order of Designation, filed (see Cr. 3829c).

16 In the District Court of the United States for the District of New Jersey

No. 3875C—18 U. S. C. Sec. 264

UNITED STATES OF AMERICA

vs.

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER AND THOMAS EDWARD REYNOLDS, ALIAS JOSEPH BINSTOCK

Indictment

Filed April 23, 1946

The Grand Jury duly impaneled on the 26th day of March in the year 1946 charges:

Count I

That on or about the 10th day of March 1946, in the City of Camden and State and District of New Jersey and within the jurisdiction of this Court, the said Emil Lustig, alias Dr. Edward E. Fischer and Thomas Edward Reynolds, alias Joseph Binstock, not under the authority of the Secretary of the Treasury or other proper officer of the United States did unlawfully and feloniously have in their possession and custody an obligation and security made and executed in part after the similitude of an obligation and security issued under the authority of the United States, to wit: A Federal Reserve Bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania of the denomination and value of $100.00, the face and back of which said obligation of the United States are of the following tenor and effect to wit:

17 100 Federal Reserve Note 100

THE UNITED STATES OF AMERICA

This note is legal tender for all debts Public and private, and is redeemable in lawful money at the United States Treasury, or at any Federal Reserve Bank. C00845384A 3

3 (Portrait of Franklin) Thesaur Amer (Seal)

Series of 1934 ONE HUNDRED

The Federal Reserve Bank of Philadelphia, Pa. Septent Sigil

C Series of 1934

Washington, D. C. B4 3

3 C00845384A

W. A. Julian Henry Morgenthau, Jr.

Treasurer of the United States Secretary of the Treasury

WILL PAY TO THE BEARER ON DEMAND

100 100 ONE HUNDRED DOLLARS 100 100

100 THE UNITED STATES OF AMERICA 100

(Vignette of building)

INDEPENDENCE HALL

100 ONE HUNDRED DOLLARS 100

with the intent to use the same contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count II

That on or about the 10th day of March 1946, in the City of Camden and State and District of New Jersey and within the jurisdiction of this Court, the said Emil Lustig, alias Dr. Edward E. Fischer and Thomas Edward Reynolds, alias Joseph Binstock, not under the authority of the Secretary of the Treasury or other proper officer of the United States did unlawfully and
18 feloniously have in their possession and custody an obligation and security made and executed in part after the simili-

tude of an obligation and security issued under the authority of the United States, to wit: A Federal Reserve Bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania or a silver certificate of the United States, the exact identity of said note being to the Grand Jurors unknown, of the denomination and value of $10.00, the back of which said obligation of the United States is of the following tenor and effect to wit:

TEN (10)	THE UNITED STATES OF AMERICA	TEN (10)
	(Vignette of building) U. S. TREASURY	
	U. S. TREASURY	
TEN (10)	TEN DOLLARS	TEN (10)

with the intent to use the same contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

A True Bill.

DENNIS J. FENTON, JR., *Foreman.*

EDGAR H. ROSSBACH,
United States Attorney.

[File endorsement omitted.]

19 District Court of the United States, District of New Jersey

No. 3875C—Criminal Indictment in two counts for violation of U. S. C., Title 18, Secs. 264

UNITED STATES
v.
EMIL LUSTIG

Judgment and Commitment

On this 29th day of April 1946, came the United States Attorney, and the defendant Emil Lustig appearing in proper person, and by counsel.

The defendant having been convicted on verdict of Guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: Having possession and control of print and impression of obligations of the United States and the defendant having been now asked whether he has anything to say why judgment should

not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Three years on the Indictment.

It is further ordered that said sentence run consecutively with the sentence imposed this day on said defendant in Indictment 3829.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) THOMAS M. MADDEN,
United States District Judge.

21 [Clerk's certificate to foregoing transcript omitted in printing.]

1 In United States District Court

[Title omitted.]

Reporter's transcript

Trial in the above matters was held before the Honorable Thomas M. Madden, Judge of the United States District Court and a Jury, at Camden, New Jersey, on April 29, 1946, at ten o'clock in the forenoon, daylight saving time.

Appearances: Grover C. Richman, Jr., Esq., for the Government. Carl Auerbach, Esq., for the Defendants.

(Mr. Richman opens the case for the Government.)

Case for the Government—(Captain) GUSTAVE KOERNER.

By Mr. RICHMAN:

Q. Now, Captain, you are a captain of Camden City detectives?
A. Yes, sir.
Q. You were in such position on March 10th of this year?
A. Yes, sir.

Q. Now, on that day, did you receive any information with
2 respect to two individuals occupying room 402 at the Walt Whitman Hotel in Camden?

A. Yes, sir.
Q. As a result of information you received, what did you do?
A. As a result of information I received, I went to the Walt Whitman Hotel.

Q. Did anybody go with you?

A. By myself. I proceeded to the desk clerk and looked at the registry at the desk there. I saw the name of Doctor Fischer and a gentleman calling himself Binstock registered at Room 402. I was satisfied that Binstock's name refreshed my mind and I corroborated that with Sergeant Murphy. I obtained a warrant for failing to register in our criminal code we have in the city of Camden, being in our city over twenty-four hours. I then proceeded to the home of the clerk of the city police court, Edward Smith, and received a warrant from him for the arrest of Doctor Fischer and Binstock for violating our code.

Q. Now then, did you return to the hotel?

A. I returned to the hotel along with Sergeant Murphy, Detective Pfleiderer, and Detective Arthur.

Q. What time of day was that?

A. Four-thirty.

Q. Four-thirty in the afternoon?

A. Four-thirty.

Q. What happened when you go to the hotel?

A. Went to room 402 of the Walt Whitman Hotel. There was no one there.

3 Q. Did you go in the room?

A. Went to the room.

Q. Who went into the room with you?

A. Sergeant Murphy, detectives Pfleiderer, and Arthur.

Q. All right. What did you find in the room?

A. Searched the room. We found first—I found a tray that was in the bureau drawer.

Q. Now, I show you a tray. Is that the tray you found in the room?

A. That is right. That is the tray.

Q. Then, what did you find, Captain?

A. Searched in the room.

Q. Now, I show you a brief case. Did you discover this in the room?

A. That was in the room.

Q. Is that the first brief case that you discovered?

A. There was three there. There was another small one—two—this size and a large one.

Q. Now, is this another of the brief cases you discovered?

A. That looks a lot like it.

Q. Now, looking first at this light brown brief case, will you look it over and see what is in it, and tell me whether it had the same contents at the time you discovered it in the room?

A. These articles here were in this bag.

Mr. RICHMAN. I would like to have the trays marked for identification.

The COURT. They will be marked.

(First tray marked "G–1" for identification and wooden
4 trays marked "G–2" for identification.)

Q. Were these pliers found by you in the bag?

A. Yes.

Mr. RICHMAN. I offer them for identification.

The COURT. The pliers will be marked "G–3" for identification.

Q. This bond paper, was that found by you?

A. That was found.

Mr. RICHMAN. I offer this for identification.

The COURT. G–4 for identification.

Q. Did you find anything else in that brief case; the light one?

A. Not to my knowledge.

Q. Look over the contents of the dark brown brief case——

The COURT. Before we go into that. Are you going to have the light brown brief case marked for identification?

Mr. RICHMAN. Yes.

The COURT. The light brown brief case will be marked "G–5" for identification.

Q. Look over the contents of the dark brown brief case, and tell us whether it contains now what it contained when you discovered it in room 402?

A. That is right.

Q. What did you find?

A. In this brief case, there was trays, there was paper cut to actual size of United States currency.

A. Is that in there?

A. No; I am looking for it. That was marked for iden-
5 tification. That is with it.

Q. Now, this is the paper you found in that brief case?

A. Absolutely.

The COURT. We will describe that as a red manila envelope with paper.

Mr. RICHMAN. Containing bond paper.

The COURT. We will mark that "G–6" for identification.

Q. Now, Captain, did you discover a tray containing bottles and——

A. Brushes.

Q. (Continuing.) And brushes? Just a minute.

Mr. RICHMAN. Will you mark this for identification?

The COURT. A tray containing what?

Mr. RICHMAN. Containing various small bottles, brushes, eye brow tweezers and what appears to be castors wrapped in a cloth and a small piece of sponge.

The COURT. It will be marked "G–7" for identification.

Q. What else did you discover?

A. These papers at that particular time were wet.

Q. You are handing me a group of papers which are marked in ink "3/10/46," wet.

A. That is right. That belongs in this envelope.

Q. Did you find them in the brown envelope you are now handing me?

A. Yes.

6 Mr. RICHMAN. Will you mark this for identification. It is a group of papers in a brown container marked "3/10/46," wet.

The COURT. It will be marked "G–8 for identification.

Q. Now, you are handing me what appears to be a magnifying glass. Did you discover that in the dark brown brief case?

A. Yes, sir.

Mr. RICHMAN. I offer that for identification.

The COURT. It will be marked "G–9" for identification.

Q. What else, Captain?

A. There was also a folder that had some paper in it. I put it back in the folder.

Mr. RICHMAN. I offer this manila envelope containing various pieces of bond paper.

The COURT. It will be marked "G–10" for identification.

Q. Now, Captain, you are handing me a piece of what appears to be plate glass. Did you find that in the dark brown brief case?

A. Yes.

Mr. RICHMAN. I offer that for identification.

The COURT. 8½ x 13. G–11 for identification.

Q. What else, Captain?

A. There was a large bag.

Q. Just confine yourself to this brief case for the time being. Did you discover this ruler in the brief case?

A. Yes.

7 Mr. RICHMAN. Mark this for identification.

The COURT. G–12 for identification.

The WITNESS. Also, this stick of wood came out of there.

Mr. RICHMAN. Mark for identification this stick of wood about three inches wide by fourteen inches long.

The COURT. 3 x 14. What depth is it?

Mr. RICHMAN. About an inch.

The COURT. It will be marked "G–13" for identification.

The WITNESS. Also, this ruler—this stick of wood with the cloth on it, and also this particular piece of cloth was found in there.

Mr. RICHMAN. You are handing me a stick of wood.

The COURT. A cylinder of wood about six and a half inches long which at that time had this piece of cloth wrapped around it.

The WITNESS. That is right, and it also had this piece with it; another piece of cloth.

Mr. RICHMAN. Offer them for identification.

The COURT. They will be marked "G–14" for identification.

Q. That manila envelope you have before you, you discovered that in this——

A. No; the contents of this bag came out of the large bag.

Q. Where was that bag?

8 A. That was in the same room with the same smaller bags.

Q. What did that bag contain; clothing?

A. Clothing.

Q. But the only articles except clothing that were found were these pieces of paper?

A. Yes.

Mr. RICHMAN. I will offer only the manila envelope.

The COURT. Just a minute, as I understand it, exhibits G–6 to G-14, all came out of this dark brown brief case.

Mr. RICHMAN. That is correct.

The COURT. Suppose we put the brief case in and mark it for identification "G–15."

Q. Now, Captain, as I understand it, this manila envelope containing printed slips of paper was found in the large suitcase which otherwise contained clothing, in room 402?

A. Yes.

Mr. RICHMAN. I offer that for identification.

The COURT. The manila envelope will be marked "G–16" for identification.

Q. Now, Captain, I show you what purports to be an impression of the face of a Federal Reserve note for $100.00. Did you find that in room 402?

A. Yes, sir.

Q. Where?

A. In the bag.

Q. Which bag?

9 A. The small bag.

Q. You mean the dark brown bag?

A. The dark brown bag.

Q. That is G–15?

A. Yes.

Mr. RICHMAN. All right, sir. I offer this for identification.

The COURT. It was found where, Captain?

The WITNESS. In the dark brown brief case.

Mr. RICHMAN. And that is G–15 for identification?

The WITNESS. That is right.

The COURT. It will be marked "G–17" for identification.

Q. As to G–17, I notice some ink writing on it. Will you tell me whose writing it is?

A. Those are my initials and the time I put them on it.

Q. You put "GK" and 3/10/46?

A. That is right.

The COURT. "GK" standing for Gus Koerner and 3/10/46 standing for the date?

The WITNESS. Yes.

Q. Now, Captain, I show you what appears to be the reverse side of a $100.00 Federal Reserve note and ask you if you saw that before?

A. I did, sir.

Q. Where did you find it?

A. In the same brief case in the Walt Whitman hotel, room 402.

Q. That is the brown brief case, G–15?

A. Yes.

Q. Were these initials "GK" and the date "3/10/46" placed on there by you?

A. They were.

Mr. RICHMAN. I offer that for identification.

The COURT. It will be marked "G–18" for identification.

Q. Now, sir, I will show you what appears to be an impression of the reverse side of a $10.00 certificate, and ask you if you ever saw that before?

A. Yes; I marked this at the same time. My initials and the date are on there.

Q. Where did you find that?

A. In the same brief case in room 402, Walt Whitman hotel.

Q. That was in the dark brown brief case?

A. Yes.

Mr. RICHMAN. I offer it for identification.

The COURT. It will be marked "G–19" for identification.

Q. After you discovered these articles, what did you do?

A. I called agent Greene, of the United States Secret Service.

Q. And did the defendants or either of them appear at room 402?

A. Later on.

Q. About what time?

A. Six o'clock.

Q. Were you there?

A. I was there along with Sergeant Murphy.

Q. Do you see the men who then appeared, in this courtroom?

A. Yes, sir.

Q. Point them out to me, and identify them if you know them?

A. Emil Lustig, the man with the gray suit and Reynolds, the man with the handkerchief to his face.

The COURT. You are pointing to the two gentlemen who are sitting at counsel table?

The WITNESS. Yes.

Q. What happened when they appeared?

A. When they appeared, they were placed under arrest. Sergeant Murphy and I were in room 402. I had placed detectives Arthur and Pfleiderer down in the lobby in the hotel to be pointed out who these gentlemen were. Agent Greene was in the room but had left approximately about ten minutes before the arrival of Lustig and Reynolds who came in the room with Pfleiderer and Arthur; Murphy and I were already in the room.

Q. Was there any conversation?

A. Arthur searched Reynolds and I searched Lustig. From Lustig's inside coat pocket—at that time, I was led to believe he was Doctor Fischer—I took an envelope with the name Emil Lustig on it, and I said, "Who is this?" and he said, "Me." He said that he was not Count Lustig but that he was the Count's brother.

12 Q. What other conversation was had?

A. Arthur searched Reynolds and he had nothing to do with it according to Lustig. He said that he was an innocent victim and that he had nothing to do with that.

Q. What did Lustig do that brought that about?

A. I asked him what his name was and he readily admitted he was Thomas Reynolds, of Albany, New York. Lustig said he had nothing to do with it.

Q. What did Lustig say he was doing, if he said anything?

A. Lustig said after that—I don't believe the bag is—There is two small bags.

Q. Let us go into that. Taking a look at this light brown bag which is marked "G–5" for identification, did anyone say that bag belonged to them?

A. Yes; Lustig claimed ownership of that bag.

Q. And everything that was in it?

A. That is right.

Q. Now, as to the dark brown bag, G–15?

A. Lustig claimed ownership of that bag and everything that was in it.

Q. Both bags?

A. Both bags.

Q. Did Reynolds claim the larger one?

A. The larger bag was claimed by Reynolds, also everything that was in it.

The COURT. What do you mean by "the larger bag"?

The WITNESS. There was a larger suitcase.

13 The COURT. The one the envelope of bond paper came out of?

The WITNESS. Yes.

The COURT. This manila envelope of bond paper, G–16?

The WITNESS. That is correct.

Q. What did Lustig say he was doing, if anything, with this material?

A. Lustig said they were not here to pass counterfeit money. They were here to sell the idea how to make it; make an easy living.

Q. Did you turn all this evidence you saw here this morning over to agent Greene, at that time?

A. Yes, sir.

Mr. RICHMAN. That is all. Cross-examine.

The COURT. Cross-examine, Mr. Auerbach.

Cross-examination by Mr. AUERBACH:

Q. Captain, were you on duty that Sunday?

A. I am on duty twenty-four hours a day.

Q. Were you on duty at Headquarters that day?

A. I was not at the Hall.

Q. Where were you?

A. At home.

Q. Who called you?

A. Detective Arthur.

Q. City Detective Arthur?

A. Yes; City Detective Clarence Arthur called me.

14 Q. What time did this call take place?

A. Two-thirty; around two-thirty in the afternoon.

Q. As a result of the telephone call from Detective Arthur, where did you go?

A. To my office Room 521 City Hall.

Q. What time did you get there?

A. I will say I just sat down to eat. I guess I got there around, maybe a quarter of three or three o'clock, something like that.

Q. Can you give us a fairly close time?

A. Well, I can't. I would not be telling you the truth if I told you the exact time. It was approximately around half past two or three o'clock.

Q. About two-forty-five, would you say?

A. In that neighborhood.

Q. That was the time you arrived?

A. Approximately the time.

Q. Well, approximately two-forty-five you arrived at the Detective Bureau?

A. Yes.

Q. When you arrived there, who was there?

A. When I arrived there, Detective Arthur was there and Detective Pfleiderer was there.

Q. Do you know how to spell Pfleiderer?

A. Yes, P-f-l-e-i-d-e-r-e-r.

Q. They were there along with——

A. Agent Norwood Greene, of the United States Secret Service.

15 Q. Now, what happened when you arrived at your office, Captain?

A. When I arrived at my office, Detective Arthur told me that Agent Greene wanted me. Agent Greene came in the office. He explained the case, and I am taking his words for it.

Q. I will ask you his words, Captain?

A. He explained the case that was described to me by the management or someone in an official capacity of the Walt Whitman hotel that at room 402 there was a suspicious person, and he gave me the name of Doctor Fischer and Binstock. He told me he had been over to room 404, which is next to 402, and that he had not seen anything, but his information led him to believe there was something going on in that room. I left Detectives Arthur and Pfleiderer there.

Q. Where?

A. In my office, Room 521, and I called Sergeant Murphy on the outside 'phone, and I asked him the name—if a man by the name of Binstock came to his mind as being a race horse man or a tout or a bookie, or something like that, and that was verified.

Q. About what time was that, Captain?

A. Oh, I will say like after three or so, around, three-fifteen. The conversation lasted about a half hour, pro and con.

Q. Was Detective Sergeant Murphy on duty that day?

A. No.

Q. Where did you call him?

16 A. I called him at home.

Q. Then, what did you do?

I went to the Walt Whitman hotel.

Q. What time was that?

A. In the neighborhood of twenty minutes after three; twenty-five after three.

Q. You have testified that you went to the desk and you checked the registrations?

A. That is right.

Q. And then, what did you do?

A. I checked the registration and found Binstock and Doctor Fischer.

Q. You told us about that. Tell me what you did after you checked the registration?

A. I came back.

The COURT. You mean you found the names of Binstock and Doctor Fischer?

The WITNESS. That is right; those names on the registry list. I came back and went to the clerk of our police court, Ed Smith, and got a warrant for failure to register.

Q. What time was that?

A. A quarter of four; about a quarter of four.

Q. Was it a quarter of four by the time you had gotten the warrant or was it a quarter of four when you called for the warrant?

A. No; I called for the warrant around half past three or so.

17 Q. And about a quarter of four, you got the warrant?

A. Yes.

The COURT. When you speak of getting a warrant for failing to register, what do you mean?

The WITNESS. For failing to register in the criminal code. With that word, all criminals, they are demanded by an ordinance passed by our city, after twenty-four hours, they must register in our criminal outfit. They must come to our identification department and make themselves known, and register as criminals.

The COURT. Had you received information that either or both Binstock and Fischer had criminal records?

The WITNESS. Yes.

The COURT. On that basis, you received a warrant?

The WITNESS. Yes; absolutely.

The COURT. For violation of a city ordinance?

The WITNESS. Yes.

Q. What information did you have that Doctor Fischer was a known criminal?

A. None whatsoever.

Q. With regard to Binstock, you knew him as a former gambler and race track man?

A. Confidence man.

Q. You knew nothing whatever about Doctor Fischer?

A. No.

18 Q. But, nevertheless, you still swore out a warrant for violation of the criminal code?

A. Yes.

Q. This was about a quarter of four?
A. In that neighborhood.
Q. Where did you go after you got the warrant?
A. Along with the aforementioned detectives I went to room 402, in the Walt Whitman hotel.
Q. In other words, there were five of you?
A. No, four; Sergeant Murphy and I, Detectives Pfleiderer and Arthur. Agent Greene stayed in my office and didn't even go.
The COURT. Did Agent Greene ask you to get this warrant?
The WITNESS. No, sir.
The COURT. Did he go to the Walt Whitman?
The WITNESS. No.
Q. There is no question about that, is there, Captain?
A. No; the only information received from Agent Greene was as to the names. I verified that by going to the hotel myself.
Q. What time did you reach the hotel?
A. In the neighborhood of four o'clock.
Q. By the way, when you went to the hotel about three-twenty or three-twenty-five and checked this registration, did you ascertain whether or not Lustig and Reynolds were there?
A. Did I ascertain whether they were in the room; no, I did not.
19 Q. Did you ask?
A. No.
Q. You got to their room at four o'clock?
A. Yes.
Q. With Pfleiderer, Arthur, and Murphy?
A. In that neighborhood.
Q. Then, what did you do?
A. I went to room 402.
Q. Did you have a key?
A. Yes.
Q. Where did you get the key?
A. From down at the desk.
Q. You walked in?
A. That is right.
Q. Were either Mr. Lustig or Mr. Reynolds present when you walked in?
A. No.
Q. When you went in, what was the condition of the room?
A. Perfect.
Q. When you say "perfect," how do you mean?
A. The bed had been made. These two brief cases and hand bag were on the left side of the room, the room was in order.
Q. The personal belongings of the occupants, were they—could you see them?

A. Could we see them?

The COURT. The clothes.

Q. The clothes—were they scattered about the room or were they hanging up?

20 A. In the closet, there was some clothes hanging there, if that is what you mean.

Q. Do you remember what clothes they were?

A. No; I can't say that—you mean for identification as to whether it was a suit of clothes or a shirt. I recall a suit of clothes but I don't recall the color.

Q. There was a suit of clothes in the closet?

A. Yes.

Q. In the drawer of the bureau, were there any socks or shirts or ties?

A. No, nothing.

Q. Nothing?

A. Only—one moment, only that tray, and that had some liquid in it. That was taken out of the top bureau drawer.

Q. And this——

The COURT. When you speak of that "tray," you mean the tray that is marked for identification "G–1"?

The WITNESS. I don't know what number it is.

The COURT. It was the first tray you gave us.

The WITNESS. That is it.

Q. Now, these wooden trays marked for identification "G–2," they weren't in the drawer?

A. No.

Q. Where were they?

A. In one of these handbags.

Q. Which one?

21 A. The brown one.

The COURT. Which brown one? They are both brown.

The WITNESS. I mean the dark brown.

Mr. AUERBACH. You mean the light brown one. I am not trying to confuse you, but my understanding is that identification G–2, these were found in the light brown brief case.

The WITNESS. This stuff was found in there.

Q. In this one, the light brown one?

A. Yes.

Q. That was in the brief case?

A. That is right.

Q. Who called Greene?

A. Sergeant Murphy called Greene.

Q. What time did he get there?

A. What time did Greene get there?

Q. Greene.

A. Greene came over in the neighborhood of five o'clock after we made a thorough search and found all this evidence I have presented.

Mr. AUERBACH. Now, Captain, don't offer anything. Just wait until my question is finished and answer my questions, if you will please.

Q. Now, Greene got there at five o'clock; is that right?

Mr. RICHMAN. The question is: How many times does he have to answer his question?

22 The COURT. All right, now, gentlemen.

Mr. AUERBACH. I am trying to get my thread back. I got a little unnecessary testimony, if your Honor please.

The COURT. You told the witness that Mr. Greene got there at five o'clock; is that right?

The WITNESS. About five o'clock.

Q. What time, if you recall, did Mr. Lustig and Mr. Reynolds arrive back at the hotel?

A. Half past six.

Q. Six-thirty?

A. In that neighborhood.

Q. From five to six-thirty, what did you do, Captain?

A. Waited for them to come home.

Q. Where did you wait?

A. In the room.

The COURT. In room 402, you mean?

The WITNESS. Yes, sir.

Q. Who waited there with you?

A. Sergeant Murphy, Agent Greene, Detective Arthur, and Detective Pfleiderer.

Q. Now, Captain, when you entered the room——

The COURT. Were all of those men in the room——

The WITNESS. At one time.

The COURT. What did you say?

The WITNESS. At one time.

23 The COURT. We are speaking now of the time you waited from five o'clock to six-thirty. Were all these people in that room?

The WITNESS. Not at all times. Do you want me to tell you why?

The COURT. No, no; you just answer the questions.

Mr. AUERBACH. I will withdraw that question.

Q. Mr. Binstock, whom you knew to be a race track confidence man; did you have any reason to believe he was a confirmed criminal or con man, or anything like that?

Mr. RICHMAN. That is objected to. That is not material.

The COURT. How is that material?

Mr. AUERBACH. I think it is material. Here we have a fellow that is being——

Mr. RICHMAN. I don't think we want any summation.

Mr. AUERBACH. I am not summing up.

The COURT. I will have to try to control that, Mr. Richman.

Mr. AUERBACH. Here we have a situation where a man is apparently guilty of failing to register—violating a criminal registration ordinance.

The COURT. We are not concerned with whether he is guilty of that or not.

Mr. AUERBACH. I am taking Captain Koerner's statement, their suspicion that that was so. He testified he knew nothing
24 about Fischer. I am trying to find out whether Mr. Binstock, as known by Captain Koerner, was such a criminal that we had a situation that would require the services of four detectives.

Mr. RICHMAN. That is argumentative.

The COURT. And it is immaterial. What difference does it make if he went there by himself and took an actual load of forceful criminals or if he took a hundred policemen and took some mean criminal that never acted up in his life? I don't see that it is material.

Mr. AUERBACH. It makes a difference, if your Honor please.

The COURT. I will sustain the objection, and allow you an exception.

Q. Was Detective Pfleiderer on duty that Sunday?

A. He was there. I can't recall whether he was on duty or not.

Q. When you went in the room, Captain, and you say that everything was all neat, perfect, I think was the word you used——

The COURT. The room was in order.

Mr. AUERBACH. He used the word "perfect."

The WITNESS. It was in order.

Q. Then, your attention was called to these various brief cases and suitcase?

A. That is right.

Q. You opened them to discover these various items you
25 produced in court?

A. Yes.

Q. They were all in the suitcase?

A. All except the tray which was in the drawer of the bureau.

Q. The items you marked as being wet, they were in the suitcases?

A. Yes.

Q. When Mr. Lustig and Mr. Reynolds came in, did you ask them to identify the suitcases?

A. In the presence of the rest of the men.
Q. Your answer is yes; isn't it?
A. Yes.
Q. Mr. Lustig, you say, identified both the light brown and the dark brown brief cases?
A. Yes, sir.
Q. I suggest to you, Captain, that he said that the light brown was his but that the small one wasn't his; is that so?
A. No; he identified both bags as his property, and Reynolds identified the large bag and said it was his property.
The COURT. When you say, "Reynolds identified the large bag," you mean the large bag which up to this time, has not been produced in court?
The WITNESS. That is right.
Q. It has also been testified that you searched Mr. Lustig?
A. I did.
Q. Did you find any money on Mr. Lustig?
A. Yes, sir.
26 Q. Do you remember what you found? The denomination of the bills, if any?
A. I remember there was some $5.00 bills and some $10.00 bills on Mr. Lustig, to the extent of about six hundred and some dollars.
Q. Then, Mr. Reynolds was searched by one of the detectives?
A. Reynolds was searched by Detective Arthur.
Q. Did you find a hundred dollar bill on Mr. Reynolds?
A. A brand new hundred dollar bill.
Q. You found a brand new hundred dollar bill?
A. Yes.
Q. Did you compare that $100.00 bill with the impression?
A. I did not. That was turned over to Agent Greene.
Q. To your knowledge did Mr. Greene compare it?
A. I have no knowledge.
Q. You were not there?
A. If he compared it, I didn't notice it.
Q. What were you doing at the time?
Mr. RICHMAN. He says he doesn't know whether it was compared or not.
Q. Do you know whether he took a $100.00 bill away from Mr. Reynolds?
A. Who?
Q. Mr. Greene?
A. No; Clarence Arthur took it away.
Q. To whom did Arthur turn it over?
A. To me.
Q. What did you do with it?

27 A. I kept it in my possession until they were convicted of the criminal code. He turned over the money.

Q. The $100.00 bill?

A. The $100.00 bill.

Q. Didn't you just testify you turned the $100.00 bill over to Mr. Greene?

A. Now, wait one minute. That is simply marked for identification, the $100.00 that was turned over to Mr. Greene?

The COURT. No, no; Mr. Auerbach has been speaking of the $100.00 that was found together with some one dollar bills on the person of Mr. Reynolds when Mr. Reynolds was searched. Is that right?

Mr. AUERBACH. That is right.

The COURT. Did you ever have them in your possession?

The WITNESS. I did.

The COURT. Did you ever turn them over to Mr. Greene?

The WITNESS. After the arrest, he was brought to my office but the money taken from Mr. Lustig and Mr. Reynolds were in my office, and the money was counted both at that particular time in front of them and brought to my office. Whether Mr. Greene examined them for counterfeit or not, I could not tell.

The COURT. Well, did you ever turn them over to Mr. Greene?

The WITNESS. No.

28 Q. When you got back to your office, Captain, were there any other Government men, Federal men, there, besides Mr. Greene, at your office?

A. No.

Q. I suggest to you, also, Captain that Mr. Lustig said that the dark brown bag belonged to a Mr. Weber. Did he say that?

A. No.

Q. Was there any talk about a third person being involved in this proposition?

The COURT. Any talk whatever of a third person in this proposition?

The WITNESS. At that particular time when he was placed under arrest, Lustig accused Reynolds of one of his friends ratting on him. He mentioned a man named—by the name of Stein. That particular night they had a drive for Palestine at the Walt Whitman hotel, and there was a party named Stein registered there. He was brought from the Walt Whitman later, and both of these men could not identify him as the man they done business with, I am sure, in Camden.

Mr. RICHMAN. You mean they would not identify him?

The WITNESS. That is right.

Q. They said they had done business with somebody in Camden?

A. No; that was the topic of conversation of how it came up.

29 Q. They mentioned a man named Weber?

A. Never.

Q. They never said that any of the stuff in these bags belonged to Weber?

A. No.

Q. No question about that?

A. None whatsoever.

Q. I suggest to you further, Captain, that when you went into the hotel the first time, you then went up to room 404 in an attempt to discover whether there was any proof of counterfeiting. Is that so?

A. No; not me.

Q. You didn't?

A. No.

Q. Did any of your detectives to your knowledge listen in at any keyholes in an attempt to get any information with regard to what these men were doing in the room?

A. You mean did my men go there or did I go to room 402?

The COURT. 404?

The WITNESS. And attempt to listen to a conversation of what was going on in room 402?

The COURT. Yes.

The WITNESS. No, sir.

The COURT. You mean not with your knowledge?

The WITNESS. No.

Q. What time did you get finished with this case on Sunday?

A. Sunday night.

30 Q. Yes; but what time?

A. I could not tell you.

The COURT. Approximately, Captain?

The WITNESS. We worked probably until half past eleven.

Q. At six-thirty they came in, within fifteen minutes or so they were arrested, and then taken to the Detective Bureau?

A. That is right.

Q. Now, that is approximately seven o'clock?

A. That is right; about that.

Q. From seven to eleven, were you concerned primarily with this particular case?

A. Yes.

Q. Give us some idea what you were doing?

A. Oh, fingerprinting, pictures, calling different bureaus, police departments to see if they had any escapees involved, for we had two men over here with records from Philadelphia and New York. It takes time.

Q. You asked them to make a statement?
A. Yes.
Q. Did they agree to make a statement?
A. No.
Q. Did they refuse?
A. Yes.
Q. Did Mr. Lustig make a statement to you that he was down here to show somebody how to operate this money machine?
A. Mr. Lustig at the time——
31 Q. No; did he or didn't he?
A. Yes.
Q. Did you ask Mr. Lustig whether he was down here making counterfeit money or to make counterfeit money?
A. Yes.
Q. What did he answer to that?
A. He said this: "We are here to make counterfeit money but we are not here to sell it. We are here to show them how to make an easy living."
Q. And did he say that the items which you brought here in court, which have been identified, were the items with which he was going to make counterfeit money?
A. He wasn't asked that question.
Q. Did he make that statement?
A. Yes.
Q. It is assumed these are the items he used?
A. That is right.
The COURT. We are not assuming anything.
Q. You did not have any previous experience with counterfeiters?
A. Oh, yes. You mean have I been on raids where the counterfeiters were arrested?
Q. Yes.
A. Yes.
Q. And where the equipment used for making of counterfeit money was seized?
A. Yes.
32 Q. Is it comparable to the items that have been introduced here?
Mr. RICHMAN. That is objected to. It is not material.
The COURT. How is that material?
Mr. AUERBACH. If your Honor please, I think I am entitled to establish if he knows whether these things made counterfeit money.
Mr. RICHMAN. He has not said they would.
The COURT. Has he?
Mr. AUERBACH. He said they were here for the purpose of making counterfeit money.

The COURT. As to that part of his testimony, he was merely quoting that. He did not adopt that statement as his own.

Mr. AUERBACH. I will withdraw the question and ask it another way.

Q. Do you know whether these items that are produced in court today would make counterfeit money?

Mr. RICHMAN. I object.

Mr. AUERBACH. I am asking him if he knows.

The COURT. I think that is proper.

Mr. RICHMAN. If he knows.

The WITNESS. What is the question?

The COURT. Did he help make it?

Mr. AUERBACH. Or assist in the preparation of it.

A. I have no experience making counterfeit money.

Q. I did not expect that you were going to take it up
33 as a career, Captain. Now ——

The COURT. Captain, you understood the question. If you know, answer it; if you don't know, say you don't know.

(Witness shakes head yes.)

The COURT. You shook your head yes. Please don't do that. Your statements have to go into the record.

Q. Do you know it could be made by the use of this equipment?

A. Yes, sir.

Q. Will you tell the court how you would do it?

Mr. RICHMAN. I think we are going a little far afield now.

The COURT. I think it is proper.

A. They have a chemical solution.

Q. Do you know what the solution is?

A. I have no experience in it.

Q. How do you know it is a chemical solution?

The COURT. No, no; wait a minute. If you are going to ask him how, to tell you how to do it, leave him do it without interruption. Go ahead, Captain.

A. A chemical solution, and the $100.00 bill, the $1.00 bill or the $10.00 bill is placed in the solution there, and that is good money, and there is a print taken off by placing it in the press with some blotters or paper and it is pressed down. Simple.

Q. And that is counterfeit money?

34 A. That is right.

Q. And that is all there is to it?

A. I could not tell you if that is all there is to it.

Q. You said you knew how to make it. Is that all there is to it?

The COURT. No, no; that is not the question. Do you know how you would try to make counterfeit money with this equipment? Wasn't that the question?

Mr. AUERBACH. I think so. I am trying to find out whether I am at the end of my story.

The COURT. The Captain is at the end of his story.

Q. And that is all there is to it?

A. Yes, sir.

Q. By the use of the processes you just outlined, this would be the result?

A. Yes.

Q. And that is counterfeit money?

The COURT. No, no.

Q. Is that counterfeit money?

Mr. RICHMAN. He is not qualified.

A. I am not positive.

Mr. RICHMAN. I object.

The COURT. The objection is well taken. I will allow it.

Q. If anybody were to present you with one of these bills, would you consider them to be United States currency?

Mr. RICHMAN. I object.

35 Mr. AUERBACH. I am asking his opinion.

The COURT. Objection sustained. They are not charged with passing.

Mr. AUERBACH. They are charged with making it, and, I think, we will——

The COURT. Making a reasonable facsimile, likeness, or similitude. It is up to the jury to decide whether it is a reasonable likeness.

Q. I ask you, Captain, whether these things are not the reverse prints of these——

Mr. RICHMAN. What difference does it make?

The COURT. That is the same line of questioning. The objection is sustained.

Mr. AUERBACH. That is all.

By Mr. RICHMAN:

Q. When you referred to this statement made to you by Mr. Lustig that he was going to show people how to make an easy living, was that made in connection with these items of miscellaneous character in the two brief cases?

A. Yes, sir.

Q. Did he say to you he was using these materials to show people how to make an easy living?

A. Yes, sir.

Mr. RICHMAN. That is all.

By the COURT:

Q. Captain, was that statement made in the presence of Mr. Reynolds?

36 A. It was made in the presence of Mr. Reynolds.

Q. And when Mr. Lustig identified certain of these articles as belonging to him, was that statement made in the presence of Mr. Reynolds?

A. Yes, sir.

Q. When Mr. Reynolds identified certain of these articles as his, was that statement made in the presence of Mr. Lustig?

A. Yes, sir.

Q. Did both of them or did either one in the presence of the other say how long they had been occupying that particular room, 402? Do you understand my question?

A. I understand the question but I could not answer it.

Q. You don't remember?

A. No; to be honest; no.

The COURT. All right, don't answer it. That is all.

By Mr. AUERBACH:

Q. Did they say, Captain, who they were teaching this money game to?

A. No.

Q. Didn't mention anybody's name? They didn't mention anybody's name, never mentioned anyone outside the name you gave us, but they said they were here to teach somebody the money racket?

A. That is right.

Mr. AUERBACH. That is all.

37 The COURT. We will recess for five minutes. You may step out ladies and gentlemen, for five minutes.

After recess HOWARD J. PRICE, sworn.

By Mr. RICHMAN:

Q. Mr. Price, where are you employed?

A. At the Walt Whitman hotel.

Q. What job do you have there?

A. I am office manager and room clerk.

Q. How long have you had that job?

A. Since July of 1942.

Q. During the early part of March, did you register into your hotel a Doctor Fischer and a Joseph Binstock?

A. I did.

Q. Do you see them here?

A. Yes; I do, sir.

Q. Would you point them out?

A. The two gentlemen who are with Mr. Auerbach.

Q. Do you know which is which?

A. Yes; I do.

Q. Which is the so-called Doctor Fischer?

The COURT. Mr. Price, will you keep your voice up so the last member in the jury box can hear you.

Which is Doctor Fischer?

A. Doctor Fischer is the gentleman next to Mr. Auerbach.

Q. And Mr. Binstock?

A. The gentleman to the right, at the end of the table.

Q. Did you make any official record of when they regis-
38 tered into your hotel?

A. That is right.

Q. Do you have it with you?

A. Yes; I do.

Q. Will you hand it to me?

(Witness complies.)

Mr. RICHMAN. May I have this marked for identification?

The COURT. It will be marked "G–20" for identification.

Q. I show you G–20 for identification and I ask you if you can further identify that?

A. That is a registration card from the hotel.

Q. Was that prepared in your presence?

A. Yes, sir; it was.

Q. Who wrote the writing on it?

A. Doctor Fischer.

Q. What did he write?

A. He wrote Doctor Ed. E. Fischer. He walked away from the desk, and I later called him back and I asked him if his reservation was for twin beds, and I asked him, "Is your wife joining you?" and he said, "No; another gentleman," and I said, "Will you add his name on the registration?" and he then wrote, "Joe Binstock."

Q. How about the address?

A. 215 East 86th Street, New York City.

Q. Who wrote that?

A. Doctor Fischer.

Q. I see some red pencil marks. Who wrote them?
39

A. They are my marks.

Q. They registered in according to your red pencil markings, on March 6, 1946?

A. That is right.

Q. What time?

A. At four minutes after four.

Q. In the afternoon?

A. That is right.

Q. To what room were they assigned?

A. Room 402.

Q. For how long did they remain in room 402?

A. From March 6 to March 10th.

Q. What time did they check out?
A. That I could not say. I was off duty.
Q. Is this record kept under your supervision?
A. Yes; kept in the auditor's office.
Q. Is it a regular official record of the Walt Whitman hotel?
A. Yes.
Q. Kept in the usual course of business?
A. That is right.
Mr. RICHMAN. I offer it in evidence.
Mr. AUERBACH. I have no objection.
The COURT. It will be received in evidence.
(Registration card received in evidence and marked "exhibit G–20.")

Mr. RICHMAN. That is all.

40 Cross-examination by Mr. AUERBACH:

Q. Mr. Price, you were on duty on the 6th of March, at four o'clock?
A. Yes, sir, I was.
Q. Is there anybody else in the hotel that does the same job as you do?
A. Yes; we have three or four others who are room clerks.
Q. Who are they?
A. Mr. Horner, Miss Evans, and Mr. Wagner, the night room clerk.
Q. Miss Evans, I assume, is a girl?
A. That is right.
Q. And the other gentleman's name?
A. Horner.
Q. He is a tall chap with gray hair?
A. Yes; heavy set.
Q. Taller than you?
A. Yes, he is, sir.
Q. But you, are you sure you took this reservation, this registration?
A. Definitely positive.
Mr. AUERBACH. That is all.

(Sergeant) THOMAS P. MURPHY, sworn.

By Mr. RICHMAN:

Q. Sergeant Murphy, you are Sergeant of Detectives of the Camden City Police?
A. Yes, sir.
41 Q. And for how long, sir?
A. Been in the Police Department eighteen years.

Q. Now, on March 10, 1946, did you accompany Captain Koerner to the Walt Whitman Hotel?

A. Yes, sir.

Q. Tell us what happened?

A. I received a call at home from Captain Koerner. He asked me to come into City Hall. I went in and he told me he had received information there was two men in room 402 in the Walt Whitman hotel, and that he suspected from information received that there was something wrong going on in there. So, we talked over what might be the hazards. He told me who they were. He said that one man was registered under the name of Emil A. Lustig——

The COURT. Registered under the name of Emil Lustig.

A. (Continuing.) Registered under the name of Doctor Edward Fischer, rather.

Q. And the other man?

A. The other man was registered under the name of Joseph Binstock.

Q. Did that name "Joseph Binstock" mean anything to you?

A. Why, I thought he had been a horse trainer, and I identified the name with race tracks over a period of years.

Q. Then, did you go with Captain Koerner to the Walt Whitman hotel?

A. I did.

Q. About what time of day was this?

42 A. We arrived at the hotel, I would say, about between four and four-thirty.

Q. Who else was with you?

A. Detectives Arthur and Pfleiderer, of our department.

Q. What did you do?

A. We got a pass key from the room clerk and went up to room 402, and went in the room.

The COURT. Previous to this time, Sergeant, had Captain Koerner secured the warrant he has spoken of?

The WITNESS. He had that when I went into the City Hall.

Q. You went to room 402?

A. Yes, sir.

Q. You and Captain Koerner were in the room?

A. Yes.

Q. Will you tell us what you found in the room?

A. Well, we checked over the drawer of the bureau, and so forth, and looked in the bathroom.

Q. Just what did you find, if anything?

A. Just the ordinary things that would be found there except in one of the drawers in the bureau, there was a pan.

Q. Is this the pan, G–1?

A. Yes, sir; that is it.

Q. Did you find two brief cases there? For instance, did you find this one marked "G–5"?

A. Yes, sir.

Q. Sergeant, turn around and face the jury. Did you find this exhibit G–2 in that brief case?

43 A. That was in the bag.

Q. What else was in there?

The COURT. If you can recall.

A. I believe this was in the bag with this.

Q. G–7?

A. Yes; that is right. That was in the bag with this, as I remember it.

Q. Now, G–6, do you recall where you found that?

A. That was in the dark bag.

The COURT. When you say dark bag, you are pointing to the dark brown brief case, G–15?

The WITNESS. That is right.

Q. Now, Sergeant, take a look at these three exhibits, G–17, G–18, and G–19. Where did you find them, if you did?

A. They were in the dark bag

Q. That is G–15?

A. Yes.

Mr. AUERBACH. May I see what the witness has in his hand?

The COURT. Exhibits G–17, G–18, and G–19.

Q. Now, Sergeant, if you will take a look at these exhibits here on this table, which range from G——

The COURT. G–2.

Q. (Continuing.) G–2 to G–19, in other words that is everything with the exception of the hotel registration sheet——

The COURT. And the pan.

Q. (Continuing.) And this pan. Will you tell us did you find these articles in either one or the other of these

44 brief cases, G–1 and G–15?

A. With one exception. There was one folder in a suitcase, in a large suitcase, and I think this is the folder.

Q. You are referring to G–10?

A. Yes.

Q. That was in a suitcase containing otherwise, clothes?

A. Clothes; that is right.

Q. Now, at the time you went into the room and made this search, were either of the defendants, Lustig or Reynolds, in the room?

A. No; they were out.

Q. Did you wait for them?

A. Yes, sir.

Q. Who waited with you?
A. Captain Koerner.
Q. How long did you wait?
A. We waited until about six-thirty p. m.
Q. At that time did the two defendants come to the room?
A. They did.
Q. Can you identify the men in the court room today who came to the door?
A. Well, Mr. Lustig with the pin stripe suit.
Q. Sitting in the middle?
A. Yes; and Mr. Reynolds on the end, with the black suit.
Q. What conversation took place when they arrived?
A. Lustig identified the two bags as being his.
Q. How about the material in each?
45 The COURT. When you speak of two bags, you mean two brief cases?
The WITNESS. He was asked a question of whether these two bags belonged to him, and he said that they did. Reynolds said further that the large suitcase belonged to him.
The COURT. Is that the suitcase that you saw the manila envelope of bond paper come out of?
The WITNESS. Yes.
Q. Did they identify themselves to you?
A. While they were being searched, all over again, Captain Koerner was searching Lustig. He pulled out an envelope with a name and address of Emil A. Lustig, Apartment 4B3, 251 West 97th Street, New York City, and Koerner said to him, "Is this you?" and he said, "Yes," he said, "That is me. I am a brother of the Count."
Q. Did Reynolds identify himself to you?
A. In this large suitcase, he identified as being his, there were papers in there with the name of Thomas Reynolds. I don't recall whether there was any address on them or not.
Q. Sergeant, you know Joseph Binstock, don't you?
A. I have seen him.
Q. Is Thomas Reynolds Joseph Binstock?
A. No, sir.
The COURT. Are either one of these men Joseph Binstock?
The WITNESS. No, sir.
Q. Was anything else said by anyone in the presence of these men?
46 A. Lustig said our racket is not passing counterfeit money. He said, "My racket is to sell people the idea how to make counterfeit money."
Q. Did he say anything about the material you had found in the room, in connection with that scheme?

A. He said everything belonged to him except these partly made notes.

Q. And those he didn't know anything about?

A. Didn't know anything about them. He never saw them before.

Mr. RICHMAN. That is all. Cross-examine.

Cross-examination by Mr. AUERBACH:

Q. He never did admit the three counterfeit notes?

A. He said he never saw them before.

Q. Did he say anything about a man named Weber?

A. Never mentioned that name.

Q. Did he say anything about teaching any particular person this racket and that is why he was here?

A. He didn't mention any particular name.

Q. Did you concern yourself, Sergeant, with trying to find any persons other than those you had arrested?

A. Yes. We had received information that another man registered in the hotel had been seen going into their room earlier that afternoon. So, the man registered in that room was a Doctor Stein, from Philadelphia. There was some sort of affair being held over there by some Palestine organization to raise
47 funds for the victims in Palestine, and Doctor Stein was one of the speakers. We contacted him, and after the meeting was over he came to the City Hall with an attorney, a local attorney, and we questioned him as to whether he had been in their room, and he said no he had not, that he had not been in anyone's room except his own and at the ballroom at the meeting. We brought him into the presence of these two men and asked them if they had ever known him or ever seen him before or if he had been in their room at any time, in the hotel, and they both said no.

Q. Then you left him go?

A. Yes.

Q. That was the full extent of your investigation about a third person?

A. That is right.

Q. You never heard any mention of a man named Weber?

A. Never heard of that name before.

Q. Did you tell Mr. Lustig that you had listened in at the door and you wanted to know where this third person was?

A. I did not; no, sir.

Q. Did Captain Koerner?

A. Not in my presence.

Q. Did anybody say anything?

A. Nobody said that in my presence.

Q. Not to your knowledge?

A. Not to my knowledge.

Q. You were not present when Captain Koerner or anyone else asked these men where the third person was?

A. That is correct.

48 Q. There is no question about that is there, Sergeant?

A. No question at all.

Q. What reason was there for you to question this Doctor Stein?

Mr. RICHMAN. I don't believe.

The COURT. He explained they received information that Doctor Stein had gone into the defendants' room.

Q. May I ask you the source of your information regarding Doctor Stein?

A. It was apparently one of the men received it in the hotel somewhere.

The COURT. Did you receive it?

The WITNESS. I did not.

Q. Now, this press, Sergeant, these two pieces of wood with the bills, that was in the brief case?

A. Yes, sir.

The COURT. Which brief case?

The WITNESS. This one.

The COURT. The large light one?

The WITNESS. That is right.

Q. When you went into the room, everything was in order?

A. Yes.

Q. All these things were packed away?

A. That is right.

Q. Including this facsimile of United States currency?

A. That is right.

Q. Were they wet or dry?

49 A. There was one package of paper in there.

Q. I am talking about these three items?

A. This particular item?

Q. Yes.

A. The pan that was in the drawer of the bureau was wet.

The COURT. No; he is speaking of the three impressions.

The WITNESS. Oh, they were dry.

Q. Which bag were they in?

A. The dark bag.

Q. And Mr. Lustig didn't say the dark-brown bag belonged to Mr. Weber.

A. He did not.

Q. He said it was his?

A. He said it belonged to him, that he was the owner of the both bags and this man owns the large suitcase.

Q. Was there any other piece of luggage in the room?

A. None whatever.

Mr. AUERBACH. That is all.

The COURT. In either of these brief cases that you discovered, were there any articles of clothing?

The WITNESS. None at all.

The COURT. The only things in them were what is here in court?

The WITNESS. That is right.

The COURT. That is all.

50 By Mr. RICHMAN:

Q. You did not find any shirts?

A. None at all.

Q. No pair of slippers?

A. None at all.

Q. Except what I produced here?

A. That is all.

Q. You did not pick these things up or anyone connected with the department did not pick these things up about the room and put them in the bag?

A. No, they were already in the bag.

Q. You didn't touch them other than to open it up to search them?

A. Yes.

Q. Was it open or locked?

A. What, the bags?

Q. The bags?

A. They were open.

The COURT. By that you mean were they physically open or they weren't locked?

The WITNESS. They were not locked.

Mr. RICHMAN. That is all.

By the COURT:

Q. Sergeant, let us see if I understand you correctly. You went to the room with Captain Koerner?

A. That is right.

Q. Was Mr. Greene with you at that time?

A. No, sir.

51 Q. When did Mr. Greene come there?

A. After we searched the room, seeing what was in it, and finding the three notes, I talked to Captain Koerner and I told him we had enough to charge him with a Federal violation, and I called Mr. Greene from the hotel and explained to him over the telephone just about what we had found, and he came over later.

The COURT. That is all.

By Mr. AUERBACH:

Q. Just one further question. When you reached the Detective Bureau as a result of Captain Koerner's call, Mr. Greene was there, wasn't he?

A. Yes, he was.

Q. And in the course of your conversation with Captain Koerner, did Mr. Greene take any part?

A. No.

Q. Did you talk to Mr. Greene?

A. I spoke to him when I came in.

Q. Did you talk to him about what might be found at the hotel?

A. No; I only talked to Captain Koerner in Captain Koerner's private office, and Mr. Greene was out in the large office talking to another man that was there.

Q. You knew he was a Federal agent?

A. Oh, positively. I have known him for a number of years.

Q. You did not accompany Captain Koerner when he first went over to check the registration?

A. I did not.

52 Q. When you went to the room with Captain Koerner, did you make any effort to find out whether Lustig and Reynolds were in?

A. Just simply pushed the key in the door.

Q. Didn't knock?

A. Oh, no.

Q. Just walked in?

A. Yes.

Q. Where was Mr. Greene while this was going on?

A. In the City Hall.

Q. Do you know what he was doing?

Mr. RICHMAN. How could he know that? He was at the Walt Whitman hotel.

Mr. AUERBACH. I am asking him.

The COURT. How would he know that? It is without the bounds of possibility for him to know that.

Q. Do you know what he was doing when you left?

A. As I remember it, he was sitting at a desk talking to a couple of other men. One man in particular he was talking to was Detective Ashenfelter, who was on duty.

The COURT. Do you know what they were talking about?

The WITNESS. I do not.

Q. Was anything said in your presence before you went over to the Walt Whitman hotel, or in the presence of Mr. Greene as to the suspicion of there being counterfeiters in the hotel?

53 A. Only as between Captain Koerner and I.

Q. What was that conversation?

A. He explained to me the information he had received. So, I talked to him and said, "Well, it doesn't seem possible for men in the counterfeiters' racket, counterfeiting money would be in a public hotel." I said, "That looks like as there was, and it is possible, that they might be trying to counterfeit race-track tickets." So, I told him that the only way out was for us to get into that room and find out what was in there; in their room.

Q. And Greene wasn't present?

A. No; the conversation was between Captain Koerner and I, and Mr. Greene was out in the large office.

Mr. AUERBACH. That is all.

HARLAN L. CLAPP, sworn.

By Mr. RICHMAN:

Q. Where are you employed, sir?

A. Bureau of Internal Revenue laboratory, Alcoholic Tax Unit.

Q. What is your job?

A. Chemist.

Q. How long have you been employed there?

A. Eighteen years.

Q. At the same kind of work?

A. Yes, sir.

Q. Now, sir, I am referring to exhibit G–7 ——

54 Mr. RICHMAN. With your Honor's permission, as I take each of these bottles out, I will ask that they be marked "G–7a", for instance.

The COURT. That will assist us in keeping them in order.

Q. I show you first a bottle marked "82949" and ask you whether or not you have examined the contents of that bottle?

A. I have; yes, sir.

Mr. RICHMAN. Now, may that be marked "G–7a" for identification.

The COURT. It will be so marked.

Q. Will you tell us what the contents of that bottle were found by you, to be?

A. I found this to contain creosylic acid or crude creosol.

Q. Is creosylic acid a derivative of phenol?

A. It is a phenol derivative.

Q. It is a phenol derivative?

A. Yes.

Q. Now, I will show you bottle marked "82947" and ask you whether you examined the contents of that bottle?

A. I did.

Mr. RICHMAN. I ask this be marked for identification "G–7b."

The COURT. It will be so marked.

Q. What are the contents of that bottle?
A. The bottle contains phenol.
Mr. AUERBACH. Phenol?
The WITNESS. Yes.
Q. Now, I show you bottle marked "82951" and ask you
55 whether you examined the contents of that bottle?
A. I did.
Mr. RICHMAN. May that be marked "G–7c" for identification?
The COURT. It will be so marked.
Q. What did you find the contents of that bottle to be?
A. That is crude creosylic acid.
Mr. AUERBACH. I beg your pardon.
The WITNESS. Crude creosylic acid.
Q. I show you bottle marked "82946" and ask you if you examined the contents of that bottle?
A. I did.
Mr. RICHMAN. May that be marked "G–7d" for identification?
The COURT. It will be so marked.
Q. What are the contents here?
A. It had a few drops of phenol in it.
Q. I show you bottle marked "82950" and ask you whether or not you examined the contents of that bottle?
A. I did.
Mr. RICHMAN. May that be marked "G–7e" for identification?
The COURT. It will be so marked.
Q. What is G–7e?
A. That appears to be tap water.
Mr. AUERBACH. Tap water?
The WITNESS. Yes.
Q. I show you bottle marked "82948." Did you examine
56 the contents of that bottle?
A. I did.
Mr. RICHMAN. May that be marked "G–7f" for identification?
The COURT. It will be so marked.
Q. What are the contents of G–7f?
A. That is a solution of magnesium sulphate; Epsom salts.
Q. I show you bottle marked "82945" and ask you whether you examined the contents of that bottle?
A. I did.
Mr. RICHMAN. May that be marked "G–7g" for identification?
The COURT. It will be so marked.
Q. What are the contents of G–7g?
A. That contained a few drops of phenol.
Q. I show you bottle marked "82952." Did you examine the contents of that bottle?

A. I did.

Mr. RICHMAN. May that be marked "G–7h" for identification?

The COURT. It will be so marked.

Q. What are the contents of that bottle?

A. They contain urine.

Q. Contain what, sir?

A. Urine.

Q. Now, sir, I show you exhibit for identification marked "G–6," numbered 82953. Did you examine the contents of that manila envelope?

57 A. I did.

Q. What did you discover?

A. The papers were wet with a creosylic acid solution.

Q. All of them?

A. Yes.

Mr. AUERBACH. Are you through with the papers?

Mr. RICHMAN. Yes; I am through with them. I am finished with this witness with one more question.

Q. From whom did you receive all these bottles and that manila envelope?

A. I received these from Norwood G. Greene, Secret Service agent.

Mr. RICHMAN. That is all.

Cross-examination by Mr. AUERBACH:

Q. What is creosol, Mr. Clapp?

A. Diahydric phenol.

Q. What is it used for?

A. It is obtained from wood or wood tar and used as a preservative, frequently.

Q. You mean you buy it in stores?

A. Yes.

Q. Is it used as a disinfectant?

A. Yes.

The COURT. Isn't the correct name of phenol products, carbolic acid?

58 The WITNESS. Phenol is carbolic acid and is usually sold by that name.

Q. For instance, lysol is a disinfectant. Does that have creosol in it?

A. Yes; that is a creosol.

Q. Can you buy creosol in a drug store or a hardware store, or any place like that?

A. Yes, sir.

Q. Under what name? Under the name of creosol?

A. I presume so. I haven't tried to buy any. It is used commonly.

Q. What is crude creosylic acid?

A. It is crude creosol itself. This crude product contains some pyridin.

Q. How do you spell that?

A. Pyridin.

Q. What is pyridin? Is that the stuff used for headaches?

A. No.

Q. Can you buy this crude creosylic acid in any store?

A. Yes.

Q. Is it expensive?

A. No.

Q. Is it also a disinfectant?

A. Yes.

Q. How about phenol?

A. Phenol is ordinarily called carbolic acid.

Q. Is that expensive?

A. No.

Q. You can buy that in stores?

59 A. Yes.

Q. Without any trouble?

A. I don't believe so. Of course, it is a poison.

Q. I beg your pardon.

A. Unless they had some local restrictions, I believe you can buy it anywhere.

Q. Now, offhand, if you know how much would you say was the cost of all the items in all these various bottles?

Mr. RICHMAN. That is objected to. It doesn't make any difference.

The COURT. How is that material?

Mr. AUERBACH. Now, if your Honor please, there are some items that are brought up here that are not very expensive. What I am trying to establish is that this whole collection can be put together for probably two dollars. I am curious to know whether he knows this stuff is expensive and how much it is worth.

The COURT. So what? We come to the question—suppose you prove it is worth a dollar or you prove a hundred dollars. What difference does that make?

Mr. AUERBACH. The cost of going into the counterfeiting business for two dollars when it might cost two thousand dollars might make a difference as to whether or not these men were counterfeiting or doing something else.

60 The COURT. I cannot follow you.
Mr. AUERBACH. I will withdraw the question. That is all.

JOHN E. ERICKSON, sworn.

By Mr. RICHMAN:

Q. Mr. Erickson, what is your business?
A. I am employed by myself.
Q. What business do you operate?
A. The Camden Ink and Color Company.
The COURT. What is your answer?
The WITNESS. The Camden Ink and Color Company.
Q. How long have you been in that business?
A. I been in business since 1933, and I have always been in business since I was a kid.
Q. Are you a printer?
A. No; not a printer.
Q. What do you characterize yourself?
A. We manufacture ink for printers.
Q. You manufacture inks for printers?
A. For printers; yes.
Q. Is phenol used in the printing business?
A. We use a byproduct of phenol for cleaning ink, dry ink, hard ink.
Q. You mean you use it to suffuse the ink?
A. To dissolve it; yes.

Q. In your opinion, would an application of creosol put
61 to an ink writing suffuse that ink?
A. In a printing ink that had a pigment in it, it would; yes, sir.
Q. It would suffuse it?
A. Yes.
Q. Would it render it capable of being transferred to another piece of paper?
A. It can be transferred, like a decalcomania almost.
Mr. RICHMAN. That is all.

Cross-examination by Mr. AUERBACH:

Q. That is creosol?
A. That is creosol; yes, sir.
Q. What do you do with the phenol?
Mr. RICHMAN. The testimony is that creosol is a phenol derivative.
Mr. AUERBACH. I don't remember it that way.
Q. Creosol is a phenol derivative?
A. Yes.

Q. You testified to that?

A. Yes.

Q. Have you used it in making maps? Can it be used for making maps?

A. It can be used for making maps; it can be used for making transfers like a decalcomania. It would transfer almost like a decalcomania.

Q. Could that be done with creosol?

62 A. It could; yes, sir.

Q. Do you know how to do it?

A. Yes; you have to wet it; wet and dry it rough.

Q. I beg pardon.

A. You just wet it and put it on there. You could do it.

Q. You mean that you put creosol on a hundred dollar bill?

A. You get it good and wet and put pressure on it. All you have to do is put some creosol on a dollar bill and then this would happen. You have to put a lot of pressure on it.

Q. Would you use a gimmick like this?

The COURT. When you say gimmick do you mean one of the aricles marked for identification?

Mr. AUERBACH. Yes.

Q. Would this do it?

A. I don't see what it is.

The COURT. It is two pieces of wood with two bolts, a bolt through each end, presumably, to which you apply pressure.

The WITNESS. That is right.

Q. That is all there is to it. That is to say, you put some creosol on a bill and put a piece of paper on top, and put it in there, and that is what you get?

The COURT. He didn't say that. He didn't say sticking was enough. He said you had to apply pressure.

Q. All you have to do is stick a hundred bill——

A. A hundred dollar bill or a one dollar bill.

63 Q. We are talking about a hundred dollars. We might as well talk big money. You stick a hundred dollar bill in here, put a piece of paper on it—any kind of paper. Would it make any difference?

A. I don't think so, not any kind of paper. You could probably use any kind of paper if you wanted to.

Q. Any kind of paper, put it in a contrivance like this, and put some pressure on it?

A. Yes; it is practically the same principle that a bank note printer uses when they make bank notes. You have to put something soft in there for the pressure between the paper.

Q. That is all you have to do?

A. To protect the ink. Don't you get that?

Q. When that impression comes off the hundred dollar bill, it is in reverse?

A. It is the reverse of the way it was on the bill, sure.

Q. Now, if you take creosote and you were to put the piece of paper and a blotter back in the machine, would you say that is good?

A. You get the original again.

Q. In the court of this production, do you lose anything? Does the dye come out?

A. You probably lose some of your color.

Q. You lose some of the color of the first take out?

A. On the first attempt, you ought to get a pretty good impression; if you transfer again, you get the original and
64 you get a lighter color.

Q. Would you say—I am showing the witness G–18—would you say this is a good one?

A. I don't know what Mr. Auerbach means.

Q. I said a good impression.

Mr. RICHMAN. I object. He is not qualified to say whether it is a good impression.

Mr. AUERBACH. If your Honor please, he has testified as to the fact after the first impression you get a pretty good reaction on color.

The COURT. He testified to that on cross-examination.

Mr. AUERBACH. Yes.

The COURT. But not on direct.

Q. Is that a good impression?

Mr. RICHMAN. He was not questioned in that regard on direct. It is not proper cross-examination.

The COURT. I will sustain the objection.

Mr. AUERBACH. Your Honor will allow me an exception.

The COURT. Certainly.

Q. Now, you are sure, Mr. Erickson, that by putting some creosote on a bill and then putting a piece of paper over it, black paper, and then putting it in that press that you can make an impression like a decalcomania I think you said? You are sure about that?

A. Yes, sir. You can break the color down; yes, sir.

65 Q. You can take off on the blank piece of paper the impression of the bill?

A. You can take off just what you got there, on that order.

Q. How long would it take?

Mr. RICHMAN. How is that material?

The COURT. He has testified that it could be done. It is proper cross-examination.

Q. How long would it take to make this impression?

A. I don't know. I never tried it. I know you can break things down with alcohol. We test them that way too. We do that to see how they stand up.

Q. You testified it can be done. Can you tell me how long it would approximately take?

A. No; I never tried it, never tried it on money or things like that. The only way we have tested it is with dry ink. You can take dry ink and stick it down and lift it up, but it can be done.

Q. It can be done?

A. It probably could.

Q. Now, you say probably, before you said it could be done. Can it be done?

A. Yes; it can be done.

Q. But you haven't any idea how long it would take?

A. No.

Q. Do you have any idea how much creosote you would have to put on a bill?

A. It would have to be pretty well soaked up on the machine.

Mr. AUERBACH. That is all, Mr. Erickson.

66 NORWOOD G. GREENE, called.

The COURT. Can we conclude with this witness by the noon recess?

Mr. RICHMAN. Is your Honor contemplating a twelve-thirty adjournment.

The COURT. Yes.

Mr. RICHMAN. I have another witness. I think Mr. Green will take past twelve-thirty.

The COURT. Suppose we recess at this time, ladies and gentlemen, and try to get back as close to a quarter after one o'clock as possible, so we can hurry along. I would like to admonish you naturally don't discuss this matter with anyone, not even among yourselves, so you don't make up your minds about any of these matters until all the evidence is in, and the case is concluded and I have charged you the law applicable to the facts, as you have heard them. Naturally, if anyone would attempt to discuss the matter with you, don't talk to them but immediately make known to me such fact and such person that attempts to talk to you. I don't imagine you will see anything in the paper on your luncheon recess, but if there would happen to be anything in the paper about this particular case, don't read it, stay away from it, so that you can keep an open and free mind on it. We will adjourn until a quarter after one o'clock.

Mr. RICHMAN. Is there any objection to my excusing Mr. Price, Mr. Erickson, and Mr. Clapp?

67 The COURT. Is there any objection, Mr. Auerbach?

Mr. AUERBACH. I think we should have Mr. Erickson.

The COURT. All right. You remain, Mr. Erickson. The rest of you are excused.

AFTERNOON SESSION

Mr. RICHMAN. With your Honor's permission, I will withdraw Mr. Green and call Sarah Lindsay.

(Mrs.) SARAH LINDSAY, sworn.

By Mr. RICHMAN:

Q. Mrs. Lindsay, where are you employed?

A. At the Walt Whitman hotel.

Mr. RICHMAN. Speak up so I can hear you.

Q. Where; at the Walt Whitman hotel?

A. Yes.

Q. What do you do?

A. I am chambermaid.

Q. How long have you held that job?

A. Twenty years.

Q. Now, about March 10th of this year, did you have occasion to go to room 402 in the hotel?

A. I did.

Q. Who was there when you went there, and when did you go in?

A. I went in there around about half past ten.

68 Q. In the morning?

A. In the morning.

Q. That was Sunday morning?

A. Sunday morning.

Q. And who was in there?

A. Doctor Fischer and Mr. Reynolds sitting over there.

Q. Why did you go in that room at that time?

A. Why Mr. Reynolds came to me and asked me would I make the room up because they were expecting company.

The COURT. When you say Mr. Reynolds, whom do you mean?

The WITNESS. The man with the brown suit.

The COURT. Sitting at the counsel table?

The WITNESS. Yes.

The COURT. When you say Mr. Fischer, whom do you mean?

The WITNESS. Mr. Fischer? Doctor Fischer.

The COURT. Whom do you mean?

The WITNESS. The one with the pin stripe.

Q. Now, you say Mr. Reynolds asked you to come in and make up the room because they were expecting company?

A. Yes.

Q. You were in the room at half past ten on that Sunday morning, March 10th?

A. Yes.

Q. What happened when you went in?

A. I made the bed up, not the bathroom, and Doctor Fischer went and laid on the bed and Mr. Reynolds went and got
69 him some pills, and Doctor Fischer said to Mr. Reynolds, "Give her a tip." So, he gave me a tip.

Q. How much?

A. I will say about thirty-five cents.

Q. Then, what else did he say to you?

A. Then, I came out.

Q. What else did you do?

A. I went to lunch. We had our lunch about half after eleven.

Q. Is 404 the room adjoining 402?

A. Well——

Q. Is there a connecting door between 404 and 402?

A. Yes, sir.

Q. Is there a keyhole?

A. Yes.

Q. Why did you go up to room 404?

A. Why that was a check out.

Q. And then what did you do?

A. I stripped the bed. I heard glass, like glass hitting against glass or metal hitting against metal.

Q. Where?

A. In room 402.

Q. All right. Go ahead.

A. Then, I looked through the keyhole.

Q. What did you see?

A. I saw Doctor Fischer standing there, and he had—he had a piece of paper like that with a narrow envelope like that, and it seemed to me the paper was wet. He took it apart and
70 pulled a piece off and gave it to Mr. Reynolds. It looked like money to me. It was green, of greenish color like money. He gave it to Mr. Reynolds and Mr. Reynolds went to a different direction.

Q. So you could not see him?

A. Yes.

Mr. AUERBACH. Please, Mr. Richman, let the witness testify.

The COURT. I think the objection is well taken.

A. (Continuing.) He went to the opposite direction and he did not come back any more.

The COURT. You mean by that he didn't come back to your view?

The WITNESS. To my view. Then, I went to making my bed. Then, I went to look through the keyhole again. Then, the desk was turned this way. A second time, that is, I am talking about.

Q. Did you see the desk?

A. Yes.

Q. What happened then?

A. Then, I saw Doctor Fischer go on laughing and he got out a little glass bottle. They were white like that, and he set them on the desk. Then, he went back again, and he brought out something that looked like that little paint brush, artist's paint brush, and he laid them down, and I didn't bother looking again. That is what I saw. Then, I saw a magnifying glass.

71 Q. That is the first time you looked through the keyhole?

A. Yes.

Q. From room 404 to 402?

A. Yes; I did.

Q. What color was it?

A. White.

Q. Did you see any colored paper in there?

A. Green. One piece he held up at the window and it looked green; a greenish thing.

Q. Did you hear any voices?

A. I heard a voice say, "That is enough of them, that is enough of them."

Mr. AUERBACH. Who said that?

The WITNESS. I heard one of the men say that.

Q. What did he say?

A. That was enough of them.

Q. Was there any other communication between Reynolds and Doctor Fischer that you heard or was that all?

A. No; that is all I heard what I told you what was said.

Q. Weren't they laughing.

A. Yes. They looked through this microscope. It looked like a piece of green. Doctor Fischer looked and Mr. Reynolds looked too.

Q. Was that the first or the second time?

A. The second time.

Mr. RICHMAN. That is all.

72 Cross-examination by Mr. AUERBACH:

Q. Now, Mrs. Lindsay, the door that connects between 402 and 404, where is that situated?

A. Where? It is right as you come in the bedroom there. The bedroom door opens right in. Here is the door.

Q. So this is the long corridor wall of the room, is that right?

The COURT. Maybe we ought to have the benefit of some little chart in order to get this thing clarified in my own mind.

A. I can tell you. Can I stand up? Here is 402. There is their room door. Well, here is 402 door.

Mr. RICHMAN. 404.

The WITNESS. 404. I meant to say that. Right in back of this 402 is that door, and when 402 door opens to go in the room, it goes in like that, and here is this communicating door.

Q. By that you mean that when 402 is open, you can't see through the communicating door?

A. Yes; but the door was closed. When they shut the other door, then I can see because this is a communicating door.

The COURT. Do you understand now, Mr. Auerbach?

Mr. AUERBACH. I think I have a pretty good idea.

Q. Now, the keyhole is that towards the corridor or the window?

73 A. This 402 window.

Q. It is toward the window?

A. Yes.

Q. When you look through the keyhole, how much of that room can you see?

A. You can see pretty good on the window and all sides of the wall that far. You can see 402 walls up and down and there is the window.

Q. When you look through the keyhole, Mrs. Lindsay, can you see the window of 402?

A. Yes, sir.

Q. Can you see the wall of what would be the corridor wall of 402?

A. You can see that.

Q. How much of the spread of the room can you see?

A. Well, about like that.

Q. About that much? In other words, you can see an arrangement of about two feet?

A. I guess you could. I know I saw enough to see the desk. The desk is about that long.

Q. Where is the desk located?

A. It was between the window and the corridor wall.

Q. The desk is between the window and the corridor wall?

A. Yes.

Q. Isn't it against the wall?

A. Look here is the window. Can I explain myself, please?

Q. Over here?

A. Here is the window that looks to a big wide building.

74 Mr. RICHMAN. It is a corner room?

The WITNESS. Yes, it is. Here is the window, and here is the wall in 402. Well, that was right against this plain wall. Here is the window and here is the corridor wall.

Q. Is that the desk?
A. It was between the window and the corridor wall.
Q. How many windows are there in 402?
A. Two.
Q. Two windows?
A. Yes, sir.
Q. Are they on one side?
A. One is on Cooper Street and the other faces Seventh Street.
Q. One on Cooper Street and one on Broadway?
A. No; on Seventh Street it faces.
Q. One faces Cooper Street and the other faces Seventh Street?
A. Yes, sir.
Q. That leaves two walls and two windows?
A. Yes; it separates there.
Q. Is that right?
A. Yes; there is a wall on this side.
Q. That is the wall that is connected to room 404?
A. No; it isn't—I am sorry, it is towards Seventh Street. This wall where the window is is to Seventh Street.

Mr. AUERBACH. I am afraid—I am not trying to be smart, but I don't understand you.

75 The COURT. Why don't you move this blackboard down and see if Mrs. Lindsay can explain it any better on the blackboard. That is only fair in my mind. Can we agree that room 402 is situated on Cooper Street and on Broadway.

The WITNESS. It is part on Cooper Street and the other part faces Seventh Street, on Cooper Street between Broadway and Seventh Street.

The COURT. Where is the window in room 402?

The WITNESS. There is two windows. One faces Cooper and the other faces Seventh Street.

The COURT. Then it is at a corner?

The WITNESS. It is a corner room.

The COURT. It is a corner room at the northeast end of the building?

Mr. AUERBACH. No; the southeast.

The COURT. No; that is——

The WITNESS. Yes; it is on the south.

The COURT. It is on the north side of the hotel.

The WITNESS. One window faces—yes, sir; the south this way.

The COURT. One window faces Cooper Street?

The WITNESS. Yes.

The COURT. And one window faces on Seventh Street?

76 The WITNESS. Yes.

The COURT. Then, it is on the northeast corner of the hotel?

Mr. AUERBACH. The southeast.

The COURT. The southeast corner of the hotel but the northeast corner; the north side of Cooper Street.

Mr. RICHMAN. That is right.

Q. It is a corner room?

A. Yes.

Q. You say this is 402?

A. Yes.

Q. It is a corner room?

A. Yes.

Q. Is there a window there?

A. Yes; that would be Cooper; faces Cooper.

Q. Where is the other window?

A. No, sir; this is Cooper, and this would be Seventh Street. There is one window up there.

Q. We will mark that a window. There is a little bathroom here?

A. Yes; there is one window here, a little bathroom here. This is a window on this wall. That is the wall that faces Seventh Street. That is a window, that is a wall, that is the corridor, and that is a wall here.

Q. In other words, 404 would be down here?

A. Yes; down here. Do you want me to fix it for you? I can do it. Here is the desk.

77 The COURT. Put this down. We are trying to get the layout of the room.

The WITNESS. Here is 404.

Q. Coming off the corridor?

A. Here is the corridor.

Q. Make a line along there.

(Witness complies.)

Q. This is the corridor?

A. Yes; here is the room door.

Q. Is it against——

A. Yes; here is the door. It is against here.

Q. Is it against here? In other words, from here to here is the door?

A. Yes.

Mr. AUERBACH. I think we can safely use the letter "D." Can you see, Mr. Richman?

Mr. RICHMAN. I can see fine.

Q. Where is the door to 404?

A. Right here.

Q. No; the door to 404?

The COURT. The door into the hall.

The WITNESS. Right here.

Q. Here is a door from here to here and here is a door from here to here?
A. Yes.
Q. Where is the door from 402 to 404?
A. Right here.
Q. Is it up against the wall or slight against the wall?
78 A. No; it is up against the wall by hinges.
Q. Right here is another door?
A. No; only one door.
Q. This is a door?
A. Yes; this is the communicating door.
Q. Where is the desk?
A. Right here.
Q. How do you place that? Is it up against this wall?
A. Yes; right up against this wall.
Q. That is the desk?
A. Yes.
Q. Right?
A. Yes.
Q. Where is the keyhole?
A. It would be right on this door.
Q. This side?
A. Yes.
Q. Right here?
A. Yes.
Q. I think we will put an "X" right here. That is the keyhole?
A. Right.
Mr. AUERBACH. I think I will clear that up again.
The COURT. Suppose you turn that around this way, Mr. Prater, so the jury can see it.
Q. When you look through this keyhole, how far can you see, back to this wall?
79 A. Yes.
Q. How far over this way can you see?
A. You can't see very much but you can see part of the window, about like that.
Q. Your vision comes about this way. In other words, you can see, for instance, here?
A. No; right, sir.
Q. That is where all this happened, right here?
A. Yes, sir.
Q. Now, you saw Doctor Fischer who is apparently now Mr. Lustig, that is this gentleman right here?
A. Yes, sir.
Q. You saw him?
A. Yes, sir.

Q. Did you see anybody else?
A. No.
Q. Nobody else?
A. No, sir.
Q. You saw Mr. Reynolds?
A. Well, Mr. Reynolds.
Q. Did you see anybody else?
A. No.
Q. You clean this room every day?
A. Every day.
Q. Did you ever see anybody in there besides these two men?
A. No, sir.
Q. On the day you looked through the keyhole, did you hear any other voices besides these two?

80 A. No, sir.
Q. Never did?
A. No, sir.
Q. Now, when Mr. Lustig was working with this paper that you testified about, was he sitting down or standing up?
A. He was standing up at all times.
Q. Was his back to you or was he facing you?
A. The first time his back was to me; the second time, it was sideways.
Q. When he had his back to you, were you able to see what he had in front of him?
A. He didn't have much there. I could see that.
Q. You don't know whether he had much there or not. You could not see?
A. No; but I did see the wooden press.
Q. This thing?
A. Yes; it was laying on the bed.
Q. You saw this microscope, you say?
A. Yes; they were looking through it.
Q. Who was?
A. Doctor Fischer and Mr. Reynolds.
Q. Was he facing you or did he have his back to you?
A. He was sideways.
Q. Was he holding this paper up?
A. No; he was looking over it.
Q. He was looking over this at something on the desk?
A. Yes, sir.
Q. You don't know what was on the desk?

81 A. When he picked up this stuff that seemed to be white, it looked like this was greenish stuff.
Q. You don't know what it was that you saw do you?
A. No; I don't know what it was but it just came into my mind.

Q. You don't know what he had in his hands do you?

Mr. RICHMAN. Your Honor please, which time does Mr. Auerbach mean, the first time or the second time?

Mr. AUERBACH. The first time she testified he had his back to her and he didn't have anything.

Mr. RICHMAN. No; she testified she saw him pick up this piece of greenish paper.

The WITNESS. I presumed it was money. It looked like that was——

The COURT. No, no; don't presume. Do you know what it was?

The WITNESS. Yes; it looked like light greenish stuff.

Q. After all this happened, what did you do with your information? Did you call the cops up?

Mr. RICHMAN. I object. I don't think it is material.

The COURT. How is that material?

Mr. AUERBACH. Your Honor please, it is for the purpose of a motion which I hope to make later on with regard to evidence which has been secured by it.

82 The COURT. Are you laying the foundation for that motion?

Mr. AUERBACK. Yes; if your Honor please.

Mr. RICHMAN. I ask it be stricken if that purpose is not served.

Mr. AUERBACH. That is perfectly satisfactory to me.

A. I went to my housekeeper, Mrs. Brown, and told her about it.

Q. You told her what you had seen?

A. Yes, sir.

Q. Do you know if she done anything?

Mr. RICHMAN. Your Honor please——

Mr. AUERBACH. I asked her if she knows if she done anything.

Q. Do you know what she did with the information?

A. No.

Q. You didn't communicate with the police?

A. No, I didn't.

Q. Tell me this, Mrs. Lindsay, on the occasion you went into the room on Sunday morning at half past ten, were any of these materials scattered around?

A. No, sir.

Q. You didn't see anything?

A. No, sir.

Q. You didn't see these brief cases?

A. No.

Q. Or the bottles?

A. No.

83 Q. How about Saturday?

A. I was off Saturday.

Q. How about on Friday?

A. No, sir; I didn't see anything on Friday.
Q. How about Thursday?
A. I didn't see anything Thursday.
Q. In other words, on all the occasions when you cleaned the room or made the bed, that you did, you never saw any of these things?
A. No, sir.
Q. The only time you saw them was when you looked through the keyhole?
A. Yes.
Q. On two occasions?
A. Yes.
Q. When you saw these bottles?
A. Yes.
Q. And saw this greenish stuff?
A. Yes, sir.
Q. But other than that, you never saw them?
A. No, sir.
Mr. AUERBACH. That is all.

NORWOOD G. GREENE, sworn.

By Mr. RICHMAN:

Q. Mr. Greene, you are an agent of the United States Secret Service?
A. Yes, sir.
Q. How long have you been such agent?
84 A. Since 1933.
Q. On March 10, 1946, did you go to the Walt Whitman hotel?
A. Yes, sir, I did.
Q. When did you first go to the Walt Whitman hotel on that day?
A. It was somewhere around two o'clock following a telephone call I received.
Q. From whom?
A. First, from Detective Koerner's office, of the Camden Detective Division, and next from the manager, the manager of the Walt Whitman hotel who told me his name was Mr. Shires.
Q. On that information, did you go into room 402?
A. No, sir; I did not.
Q. Did you see either Mr. Lustig or Mr. Reynolds?
A. I saw Mr. Lustig.
Q. From 404, through the keyhole, the same keyhole that Mrs. Lindsay used?
A. Yes, sir.

Q. Did you see anything going on?
A. I did not.
Q. When did you return to the Walt Whitman hotel?
A. About five o'clock.
Q. Did you then go to room 402?
A. Yes. sir.
Q. What did you do then when you came back?
A. Captain Gus Koerner and Sergeant Thomas Murphy, of the Camden Detective Division, were in the room. On the bed I saw two brief cases. I saw a large suitcase against the wall.
85 Q. Now, Mr. Greene, checking over the exhibits, are these the two brief cases, G–1 and G–15, that you saw?
A. Incidentally, I saw all three of these through the keyhole, against the wall. I saw all this paraphernalia; all of it.
Q. What do you mean?
A. All of the government's exhibits from G–2 to G–19.
Q. Now, looking at these exhibits G–1 to G–19, which are all here, did you see all of them in room 402 when you arrived there?
A. Yes, sir.
Q. Where were they?
A. On the bed.
Q. Now, did you wait there with Captain Koerner and Sergeant Murphy?
A. Yes, sir.
Q. Until when?
A. Until about six-thirty.
Q. At that time, did the defendants appear?
A. About six-thirty, a few minutes before six-thirty, I went out to get some sandwiches. I observed down in the lobby, I observed Detective Pfleiderer and Detective Arthur walking hurriedly towards the elevator. I joined them and walked up behind them to the entrance to room 402 where defendants Lustig and Reynolds were in the act of opening the door.
Q. Now, they are the two men sitting to the left of Mr. Auerbach?
A. Yes, sir.
86 Q. Who is Mr. Lustig?
A. Sitting next to Mr. Auerbach.
Q. And next to Mr. Lustig, on the other side of him?
A. Is Reynolds. Whom I knew at that as Doctor Fischer and Joseph Binstock.
Q. When they were in the act of opening the door, what happened?
A. The detectives placed the two under arrest. The door was opened by Detectives Arthur and Pfleiderer. Captain Gus Koerner searched Lustig; Detective Arthur searched Reynolds. On

Lustig's person among papers was found six hundred and some dollars in used currency—I didn't count it—on Reynolds was found a new hundred dollar bill and several new one dollar bills, and some used five dollar bills.

Q. All right, sir. Now, did you have any conversation with Mr. Lustig?

A. Yes, sir; I did. Captain Koerner turned over to me the three impressions, the face and back of a hundred dollar bill and the back of a ten dollar bill.

Q. By that, you are referring to exhibits G–17, G–18, and G–19; is that correct? [Mr. Richman hands the exhibits to witness.]

A. Yes, sir; I am referring to those impressions which are marked for identification "NGG 3/10/46," NGG for Norwood G. Greene and the date 3/10/46 on all three. I was standing between the two single beds and I said to Lustig, "Are these brief
87 cases yours?" and he said, "Yes." He says, "The chemicals and the sheets are mine." He says, "Reynolds had nothing to do with it." He said, "I don't know anything about these impressions. I haven't made any counterfeit money. My business is showing other people how to make counterfeit money."

Q. Was there any other conversation?

A. As we were leaving the room after we had gathered all this evidence together, Lustig turned to Reynolds and said, "I told you that fellow Stein was no good and if you don't tell him so, I will."

Q. All right. Then, what happened?

A. They were taken over to the Camden Detective Division, and I had dinner, and then accompanied by Detectives Pfleiderer, I came back to the Walt Whitman hotel and found that there was a Doctor William Stein registered in room 306. I sent up, and I had Doctor Stein paged. He came down and I asked him if he had been in room 402 and he said that he had not. I told him that I was seeking information, that I wanted to know if he had been in that room, and who he had talked to and what they had talked about, and he said that he had not been in room 402, and I told him that I would have to take him over to the City Hall for possible identification by these two defendants who were under arrest.

Q. Did he later do that?

A. He did that.

Q. Were you present when these two defendants, Lustig and Reynolds, were confronted with Doctor Stein?

A. Yes, sir.

88 Q. What did they say to him?

A. Reynolds faced him first and said that he was not the man. Lustig faced him and first he said yes and then he said no.

Q. What did Doctor Stein say?

A. He said no.

Q. Did he say that he had ever seen him before?

A. He said he never had seen him before.

Q. How many counterfeit cases have you handled since you have been a Secret Service agent?

A. Most of our cases were handled from 1933 to 1937.

Q. Were you actively engaged in handling cases during that period?

A. Yes, sir; and I have been on counterfeiting plants both during that time and since that time.

Q. Were you also engaged in the educational program that took place at one time in educating bankers and so forth, how to detect counterfeit money?

A. Yes.

Q. How long did that educational program last?

A. That lasted about five years.

Q. What were your duties during that campaign?

A. Giving lectures, part time lectures in connection with how counterfeit money is made, how it is sold and how it is devised.

Q. And how it is detected?

A. How to detect counterfeit money.

89 Q. Look at exhibits G–17, G–18, and G–19, and tell me whether, in your opinion, these impressions are genuine or counterfeit?

A. They are counterfeit.

Mr. AUERBACH. Counterfeit impressions.

Mr. RICHMAN. Impressions.

Q. Are they and each of them reasonable facsimiles of the bills which they are intended to imitate?

A. Yes, sir; they are.

Mr. RICHMAN. That is all.

Cross-examination by Mr. AUERBACH:

Q. Tell me, Mr. Green, are they such resemblances as to deceive an unsuspecting man; a prudent man?

Mr. RICHMAN. I object. This is not under the passing statute. This is under section 264.

The COURT. The passing——

Mr. AUERBACH. I seem to recall the word similitude.

The COURT. That is in the words of the statute.

Mr. AUERBACH. I am calling your Honor's attention to the case of the United States v. Cool.

The COURT. I will allow the question.

Q. I shall repeat it, Mr. Greene. Are these impressions, Mr. Greene——

The COURT. They merely complain about them in their present form.

Mr. AUERBACH. Yes; in their present form.

90 Your Honor please, we are concerned with these three impressions in their present form, and that is what we have been indicted for. I don't think we have to meet what would happen if there was an entirely different situation. We are charged with making a similitude of United States currency which, on its face, is in reverse. We contend that no honest, reasonable—no ordinary reasonable man would be deceived by such things. I want Mr. Greene's opinion as an expert.

The COURT. In that form in which you direct the Court's attention to the question, I will not allow the question, and I will allow you an exception.

Q. I ask this: The exhibits which you have before you are they such a likeness or resemblance as to be calculated to deceive an honestly sensible man of ordinary care and observation?

Mr. RICHMAN. I object.

The COURT. To be used to calculate.

Mr. RICHMAN. That is right. With that amendment, I have no objection.

Mr. AUERBACH. With what amendment? I do not understand the amendment.

The COURT. To be used to calculate. You go ahead and put the question.

Q. I asked you, Mr. Greene, whether the exhibits you have before you are such a likeness or resemblance to United States

91 currency as to be calculated to deceive an honest sensible, an unsuspecting man of ordinary care and observation?

The COURT. Are you finished?

Mr. AUERBACH. Yes.

The COURT. I will not allow the question unless you see fit to add to it the words of the statute, "in whole or in part," as I read the statute.

Mr. AUERBACH. I will accept that. Add to the question, "in all or in part."

The COURT. No, "in whole or in part."

Mr. AUERBACH. In whole or in part, are the exhibits which are before you——

A. Yes, sir; and with your Honor's permission, I would like to elaborate on that a little bit.

The COURT. Go ahead.

Mr. AUERBACH. Your answer was yes.

A. According to our experience with Secret Service, I have obtained from businessmen a split ten dollar bill, that is the back of a ten dollar bill that was passed in this manner, it would be folded, you understand. A man could sit in a car and order a dollar's worth of gas, and after the materials had been delivered

to the car and the change given before the gas station attendant could see the ten dollar bill.

Mr. AUERBACH. Your Honor please, I do not know what connection we have between split ten dollar bills and this case. I don't think that is a proper answer.

92 The COURT. His explanation goes to how a likeness or similar to this—like this could be accepted by a person of reasonable care, and in his explanation, he is demonstrating or using the illustration of a case that actually occurred, showing how people can be fooled into accepting money. Isn't that the purpose?

The WITNESS. Yes, sir. It is just one of several cases which I could relate.

The COURT. Go ahead.

The WITNESS. This man held the ten dollar bill. He held it folded so the gas station attendant saw the numeral ten, the gas station attendant handed out nine dollars, the passer took it and the car left, and by the time the gas station attendant unfolded the bill, the car was gone. That was one type of them. We had a number of instances. Another, we have received from victims play money. You have heard of United States stage money, the exact size of genuine money. Whenever we run across that we confiscate it. Play money looks like real money because it is the actual size and color of it. In the light of those circumstances, I would say yes to Mr. Auerbach's question.

Q. Mr. Greene, are you trying to tell me that because sometimes someone folded up and split a dollar——

The COURT. Let us say split a bill.

Q. (Continuing.) Split a bill and passed it on a filling
93 station attendant that an ordinary reasonable man would be deceived into thinking that is money?

A. It is not the way an ordinary, reasonable, and prudent man would act.

Q. That is what the question says, an honest——

The COURT. An honest, sensible, and unsuspecting man.

Mr. AUERBACH. Of ordinary care and observation—an honest, sensible, and unsuspecting man of ordinary observation would he be fooled by these instruments?

A. Not in its present state. Neither of these in their present state.

Q. In its present sate?

A. This is incompete.

Q. So now, you say no?

The COURT. But when you add the words the court is instructing you to add, "in whole or in part."

The WITNESS. In whole or in part; yes.

Q. What do you mean by "in whole or in part, yes"?

A. You take a pair of scissors, trim this down to actual size, the actual size of a bill, then you have something that is different.

Q. You mean to tell me in this present situation nobody would be deceived?

A. I don't think so. There is too much paper.

94 Q. You say if this is trimmed—I again put my question. An ordinary, unsuspecting person your Honor called him, to deceive an honest, sensible, and unsuspecting man or ordinary care and observation, if this was cut down, this would deceive him?

A. Based on my experience. I don't mean a bank teller.

Q. No; I don't believe anybody would try to pass these with a bank teller. Does the fact that the hundreds are in reverse, does that affect your opinion any?

A. No.

Q. So the fact that the hundred is on the reverse side on exhibit G–17 would not affect your opinion any?

A. No.

Q. You think an honest, unsuspecting man of due care and observation would accept this?

The COURT. Could.

Q. (Continuing.) Could accept this as United States currency, and that is your opinion?

A. Yes, sir.

Q. How about a person of ordinary intelligence acting with ordinary care in a business transaction?

Mr. RICHMAN. Your Honor please, we can go on all day defining various kinds of people.

The WITNESS. It depends on what kind of business.

Mr. RICHMAN. Wait a minute. I think it has been covered.

95 The COURT. I think it has been covered.

Mr. AUERBACH. If Your Honor please, I think there is a slight difference. There is a difference in the test.

The COURT. You put your question again.

Q. Would a person of ordinary intelligence acting with ordinary care in a business transaction be deceived by the instrument, by the exhibits which are before you, in whole or in part?

Mr. RICHMAN. If Your Honor please, I think we have had that question three times and it has been answered three times.

The COURT. Except by the addition of "in a business transaction." Mr. Auerbach, frankly, I don't know how you would have any transaction that involves the transfer of money which is not a business transaction.

Mr. AUERBACH. The case from which I cite uses the term business transaction.

The COURT. I think we have covered the very same question in substance, three times. I will sustain the objection.

Mr. AUERBACH. Your Honor will allow me an exception?

The COURT. Yes.

Q. Do you consider, Mr. Greene, the exhibit which you have before you as being an executed or completed instrument?

A. As far as it goes; yes.

96 Q. Is it a completed instrument?

A. Well, completed instrument—I wish you would sort of enlighten me. The face of this hundred dollar bill is the negative impression. It is not a positive impression. Is that what you mean?

Q. I am asking you whether you think it is a completed instrument on its face?

A. It is completed so far as it goes. It is the under face of a hundred dollar bill.

Q. You are now saying you consider that to be a completed instrument?

A. Well——

Mr. RICHMAN. He says he considers it to be the complete face of a hundred dollar bill.

A. (Continuing.) It is the complete face of a hundred dollar bill. If that does not answer your question, I would appreciate your asking it differently.

Q. Your answer is this: It is a complete hundred dollar bill?

A. It is the complete face of a hundred dollar bill.

Q. Now, Mr. Greene, you say you got a call from Mr. Shires at the hotel?

A. Originally, from Detective Arthur, and then from Mr. Shires.

Q. When Mr. Shires called you from the hotel, what did he say?

A. He thought there was a violation in one of the rooms

97 of the hotel involving counterfeit money.

Q. Did you ask him on what he based his opinion?

A. No, I didn't. I told him I would be there in a few minutes.

Q. When you got the call from Detective Arthur, what did he say?

A. He mentioned also there might be a violation of the United States laws, or words to that effect. Detective Arthur called me first and said that a man at the Walt Whitman hotel thought there was some violation which pertained to a violation of the currency laws of the United States, or words to that effect, and so he asked me if I wanted one of the managers of the hotel to call me, and I said, "Yes, have him call me," and following that call I went to the hotel.

Q. Now, Mr. Shires, did you ask him the source of his information?

A. I didn't talk to Mr. Shires other than from the office.

Q. Well, from the office?

A. No, I didn't.

Q. Did you ask him if he knew in what way the laws were being violated?

A. He told me that he thought that some occupants of the room were making counterfeit money.

Q. Did you ask him the source of his information?

A. I don't recall. I eventually obtained the source.

Q. That was Mrs. Lindsay?

A. Yes.

98 Q. You didn't obtain that information on that Sunday?

A. No; not totally. I talked with Mrs. Lindsay on Sunday but I didn't talk with her very long, just a few moments, and she didn't give me the same detailed information that she testified to here on the stand until last Friday.

Q. In other words, when Mrs. Lindsay spoke to you on that Sunday she didn't tell you about this green stuff?

A. She said she saw on the table what looked like money, and she saw the doctor handling it. That was the substance of her conversation at that time. As I say, I didn't take up much time talking to her. I went down to room 404 and looked through the keyhole.

Q. Was that after you spoke to Mrs. Lindsay or before?

A. It was before.

Q. Then, what happened when you looked through the keyhole?

A. I saw Lustig walking up and down the room.

Q. Did you see Mr. Reynolds?

A. No, I didn't.

Q. Did you see the brief cases?

A. I saw that one bag and the suitcase in the corner next to the corridor wall.

Q. Did you see the press?

A. I didn't see anything except the three suitcases and the desk, and what appeared to be a magnifying glass on the top of the desk.

Q. Did you see any of the little bottles?

A. No.

99 Q. How long were you at the keyhole, Mr. Greene?

A. About fifteen minutes.

Q. Did you hear any conversation?

A. I heard voices, but the radio was on and I could not distinguish what was said.

Q. How many voices do you think you heard?
A. I don't know.
Q. Did you hear more than one?
A. I would say two.
Q. Might it have been three?
A. It might have been three.
Q. Then, where did you go?
A. I went over to detective headquarters.
Q. Whom did you see there?
A. Detective Arthur.
Q. Did you have any conversation with Detective Arthur?
A. Yes. I told him that I had not seen any evidence of counterfeiting.
Q. Were you satisfied that there wasn't any counterfeiting going on?
A. Was I satisfied that there was no counterfeiting going on? I would say yes.
Q. You were satisfied?
A. That is a difficult question to answer.
The COURT. You will have to take your frame of mind back to that Sunday afternoon at that particular time, if you can.
100 A. From an evidential standpoint, I was satisfied there was no counterfeiting.
Q. Let us not talk about it from an evidential standpoint; let us talk about it from the standpoint as to whether or not you were satisfied?
Mr. RICHMAN. Mr. Greene is an investigator for the Secret Service. He can talk about it in other ways.
Mr. AUERBACH. I am satisfied that Mr. Greene will get along very well.
The COURT. That is not necessary, gentlemen. We don't have to have speeches. We will have them at the proper time. Mr. Auerbach is attempting to lay a foundation for this evidence question, and, I think, for that purpose it is proper.
A. I was satisfied that there was no evidence of counterfeiting.
Q. In spite of the fact you had a call from Detective Arthur and had spoken to Mr. Shires who had both stated to you that there seemed to be some violation of the United States laws or something going on in that room about counterfeiting, and you being fifteen minutes at the keyhole, you were then satisfied there was nothing wrong about what was going on in room 402?
The COURT. He didn't say that. He said he was satisfied there was no evidence of counterfeiting.
Mr. RICHMAN. Insofar as he was concerned.
101 Q. That was as far as you were concerned, there was no evidence of counterfeiting?

A. That is right.

Q. So far as you were concerned, the occupants of the room were not guilty of any violation as far as you knew?

Mr. RICHMAN. If your Honor please, I object to the words not guilty.

The COURT. There was no evidence of any violation.

Mr. AUERBACH. If your Honor please, I think everybody is testifying for you but the witness. I am not trying to be fresh.

The COURT. If the questions are put properly, I think they would be all right.

Mr AUERBACH. Here is a man—we have a man here who is a Secret Service agent.

The COURT. What difference does it make if he is the President of the United States. Your duty is to put questions properly.

Q. From your observation of fifteen minutes at the keyhole, you saw no evidence of counterfeiting?

A. That is correct.

Q. You then went back to detective headquarters and you told Detective Arthur you saw no evidence of counterfeiting?

A. That is correct.

Q. So far as you were concerned, there was nothing going on in room 402 that was a violation of the internal revenue
102 laws? So, therefore, your interest in the case ceased?

A. That is right; officially.

Q. Nevertheless—by the way, what time did all this take place?

A. About—until about—what incident are you referring to? Beginning with what and ending with what?

A. I am now interested in the incident about your telling Detective Arthur you saw no evidence and you were no longer interested in it, officially?

A. That was sometime about two-thirty.

Q. Did you remain at the detective bureau?

A. I did.

Q. Did Captain Koerner come in while you were there?

A. That is right. Detective Arthur called Captain Koerner.

Q. Did Sergeant Murphy come in?

A. That is right.

Q. Did you have any conversation with Captain Koerner?

A. I did. I told him I had been over and looked through the keyhole for fifteen minutes, and I didn't see any evidence of counterfeiting.

Q. Do you know whether or not Captain Koerner and Detective Murphy went to the hotel after that?

A. I know they left for that purpose stating they were going there.

Q. Did you get a 'phone call later on?
A. I did.
Q. What time?
A. Somewhere around five o'clock.
103 Q. Did you then go over?
A. I went over to the hotel.
Q. You went to room 402?
A. Yes.
Q. When you got there all this stuff was lying on the bed?
A. That is correct.
Q. You examined the various items?
A. I looked at it.
Q. Were you then satisfied that something was then going on concerning counterfeiting?
A. I was.
Q. As a result of that, did you——
Mr. AUERBACH. I think the official term is swear out an information, if your Honor please.
The COURT. Sign a complaint.
Q. (Continuing.) Did you then sign a complaint?
A. I did, the next day.
Q. What time the next day?
A. After I consulted Mr. Richman. The next day was Monday.
The COURT. You mean the assistant United States attorney?
The WITNESS. Assistant United States Attorney; yes.
Q. The gentleman in the brown suit?
A. Yes.
Q. When Mr. Lustig and Mr. Reynolds came in, they were searched?
A. Yes; by Captain Koerner and Detective Arthur.
104 Q. Mr. Lustig had a fairly large quantity of money?
A. Appeared to have; yes, sir.
Q. I think you testified there were no hundred dollar bills in his money?
A. That is correct. That is what we testified to.
Q. There was a hundred dollar bill found on Mr. Reynolds?
A. Well, a new one.
Q. Did you match the hundred dollar bill with that impression?
A. No, sir. I observed that the ink on this new hundred dollar bill had not been tampered with. In other words, the bill was new in appearance and I concluded it was not the pattern bill from which this hundred dollars was made.
Q. You gave the hundred dollars did you to Mr. Reynolds?
A. No, sir. At the time I looked at the bill it was in Captain Koerner's possession.

Q. Did you ask Mr. Reynolds and Mr. Lustig where they had been between the time they left the hotel and the time they came back?

A. I don't recall whether I asked them or whether Captain Koerner asked them. We found out they had been down to dinner at Gloucester. It seems to me I did ask him.

Q. Did you go to Gloucester after that?

A. The next day.

Q. Did you inquire as to whether a hundred dollar bill had been passed?

A. I asked for the proprietor and they said he had gone to Florida the night before. I asked if we might look over
105 the currency in the various cash registers. I looked over them and found nothing.

Q. When you say you found nothing, what do you mean?

A. I didn't find a hundred dollar bill or a ten dollar bill which, in my opinion had been used as a pattern one.

Q. Mr. Greene, I suggest that you that when you returned to the detective bureau, after your vigil at the keyhole, you discussed with Captain Koerner the possibility of making a raid or making an entrance into this room to see whether or not anything might be discovered that would concern itself with counterfeiting. Is that so?

A. That is not so.

Q. You never had any discussion with him?

A. I made no suggestions.

Q. Did you have any discussion with him regarding the possibility I mentioned?

A. I mentioned the names of Doctor Edward E. Fischer and Joseph Binstock. As soon as I said Binstock that name seemed familiar, and he reached over and grabbed the telephone and called Detective Sergeant Tom Murphy.

Q. You don't know whether he had been called by any city police prior to that?

A. No; I don't.

Q. You didn't discuss with Captain Koerner anything about making an entrance or going into room 402 to see whether anything would be found there?

A. No, sir.

Q. You weren't interested officially?

106 A. Officially, I wasn't interested.

Q. But, nevertheless, you remained at detective headquarters from half past two to five o'clock, unofficially?

A. I was curious to see what they would find.

Q. You had no indication as to what they would find?

Mr. RICHMAN. If your Honor please, I object. That is immaterial.

The COURT. Objection overruled. Go ahead.

A. Captain Koerner thought they might be making a race track ticket.

Q. I am talking about your intimation to Captain Koerner?

A. No, sir.

Q. You had no thought that there might be anything wrong in spite of the fact you had spoken to Mr. Shires, in spite of the fact you spoke to Mrs. Lindsay; spoken to Mrs. Arthur——

The COURT. Detective Arthur.

Mr. AUERBACH. What did I say?

The COURT. Mrs. Arthur.

Q. (Continuing.) Detective Arthur, in spite of the fact you had spoken to all three of them, looked in the keyhole, you were still curious to sit in the detective bureau from half past two to five o'clock but you weren't curious enough to check over with Mrs. Lindsay as to her information to find out whether there might be or might have been a violation?

107 Mr. RICHMAN. How many questions do we have now?

The COURT. I think we have got a minimum of three.

A. I didn't check with Mrs. Lindsay between two-thirty—between the time I left the hotel and five o'clock.

Q. You were no longer curious about her testimony?

A. I was curious as to what she might have seen.

Q. You weren't curious enough to go back to talk to Mrs. Lindsay?

A. Yes; I went back.

Q. How much later?

A. It was about ten days later. By that time, we had a collection of odds and ends.

Q. Including the two impressions?

A. Yes.

Q. Between half past two and five o'clock, you weren't curious enough to go back and talk to Mrs. Lindsay?

A. No.

Q. You weren't curious enough to go back and talk to Mr. Shires as to his source of information, and to see Mrs. Lindsay?

A. Yes.

Q. You weren't curious to talk to Detective Arthur as to his source of information of counterfeiting going on?

A. He told me there was.

Q. But, nevertheless, you were curious enough to wait in the detective bureau from half past two to five o'clock until you

108 got a call from Murphy, and all this was found out?

A. That is right.

The COURT. When you got the call from Murphy he told you at that time that they had found all this paraphernalia that has been marked here in evidence?

The WITNESS. He didn't get the knowledge at that time, if your Honor please. He said it looks like these people are making counterfeit money and you better come over.

Q. All this stuff was on the bed?

A. Yes; when I arrived.

Q. Who put it back in the brief cases?

A. Who put it back in the brief cases?

Q. Yes.

A. I believe Captain Koerner put it back in the brief cases.

Q. Was he assisted by Detective Sergeant Murphy?

A. Probably by Detective Murphy.

Q. Was it done in your presence?

A. Yes, sir.

Q. And then, when Mr. Lustig and Mr. Reynolds came back all the stuff was installed in the brief cases?

A. Yes, sir; it was all in the brief cases, and Mr. Lustig said he didn't admit ownership of the three impressions.

Q. Is that the whole conversation?

A. Yes, sir. That was the first question I asked him. I said, "Are these three impressions your's? What do you know about them?" He said, "Nothing. They are not mine." He said, "These chemicals in the handbag, these are mine."
109 He said, "I am not making counterfeit money. I am only showing people how to make it."

Q. He readily admitted all this was his?

A. Yes.

Q. He denied this?

A. Yes; he denied them.

Q. Did you ask Mr. Reynolds whether these things were his?

A. Well, over in the detective division I asked him. He said he didn't know anything about it. His racket—his business was race track gambling.

Q. Now, tell me something, Mr. Greene, you have attempted to establish a record as an expert in the making and spotting of counterfeit money——

The COURT. The making of counterfeit money?

Q. (Continuing.) Spotting. You have no experience in the making of counterfeit money or any knowledge on that subject?

A. No, sir.

Q. Your only experience concerns itself with identifying money as being real or counterfeit?

A. Yes; and reading up on it from text books.

Q. But, you are an authority on when—you are comparatively an expert in observing whether money is true or counterfeit?

A. That is right.

Q. You have no knowledge or information about how you
110 make it; is that right?

A. Only in the light of the plants I have seized.

Q. You have seized a plant like this? When?

A. Not identical. I seized a plant with a wooden press, in a suitcase.

Q. Did they have plates?

A. Plates? I am trying to recall if they did. Yes, sir; they did. There were plates.

Q. As a general rule, Mr. Greene, in your experience in raids and everything else, did you usually find if you find counterfeiters you usually find copper plates or some plates or engraving from which the money is copied?

A. Yes, sir; copper plates and glass plates. This is transfer money.

Q. This is what?

A. What you call the direct transfer method.

Q. In your opinion, if you know, do you think you could make these things with that?

Mr. RICHMAN. I object. We have got to stop somewhere.

The COURT. I will allow it.

A. I have. I have seen these impressions made with that kind of equipment.

Mr. AUERBACH. That is all.

Mr. RICHMAN. I will offer in evidence, if your Honor please, exhibits 1 to 19, inclusive.

The COURT. At this time, the jury may step out for five
111 minutes.

Mr. RICHMAN. I have made the offer. Is there any objection?

Mr. AUERBACH. I have no objection to the introduction of the items. I am only concerned with the matter brought up by Mr. Greene. When he reached the hotel, this stuff wasn't in the brief cases. It was on the bed and it was later put in by either Mr. Murphy or Captain Koerner. Now, I am perfectly willing to say these things were there. That is not the point of my objection. I don't know whether I am sufficiently learned evidentially to know whether I have a proper objection by virtue of the fact there is a divergence in the testimony between Mr. Greene and Captain Koerner.

Mr. RICHMAN. I don't know of any.

The COURT. I don't know of any divergence. The testimony was they found them in these brief cases, and that is where they

were when Mr. Lustig and Mr. Reynolds came in, and on that point, I find nothing wrong with the evidence at all. If that is your only point——

Mr. AUERBACH. I have no objection.

The COURT. They will be received in evidence and will bear the respective numbers in evidence that they bore for identification.

(Exhibits are marked in evidence as "exhibits 1 to 19" inclusive.)

112 Mr. RICHMAN. Now, sir the Government is prepared to rest. I thought that Mr. Auerbach had a motion. We could dispose of it while the jury is out.

The COURT. Do you rest?

Mr. RICHMAN. I prefer to rest in the presence of the jury.

The COURT. All right, we will recess. I will hear you gentlemen at side bar.

AT SIDE BAR—MOTION FOR THE SUPPRESSION OF EVIDENCE

Mr. AUERBACH. I want to make a motion for the suppression of the evidence along the same lines I urged the other day——

Mr. RICHMAN. The evidence is in.

Mr. AUERBACH. I was under the impression I should again move to suppress it.

The COURT. That should have been done before it went in. However, I will not rule you out because of the untimeliness of your motion. But I think it has been established that there was a basis for the city authorities to obtain their warrant of arrest, and then, in the event there was no connection between the Federal authorities and the city authorities to the extent of an arrangement whereby the city authorities would go in and make an illegal raid, it seems to me the warrant being proper for the violation of the local law, they went in to make an apprehension under an arrest

113 warrant, and they can make their search incident to that arrest. Even under the Federal law, I think that would be a proper search and seizure. Even if that were not so, I do not see any connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law. So, I will deny your motion and allow you an exception.

MOTION FOR DIRECTION OF VERDICT OF ACQUITTAL IN FAVOR OF DEFENDANT REYNOLDS

Mr. AUERBACH. I would like to make a motion for the direction of a verdict of acquittal in favor of the defendant Reynolds. The proof, as I heard it and so far as I can recall it, it seems to me the only evidence which might possibly connect up Mr. Reyn-

olds was a statement made by Captain Koerner, I think it was, that the bag containing two—a large bag which has not appeared in evidence was his, and in the bag was found a brown manila envelope with a pile of plain, white bond paper.

The COURT. That together with the admission on the part of the defendant Reynolds that the bag in which some of this—from which this paper came would, it would seem to me, to be enough to take it to the jury, but when you couple that with the other testimony on the part of Mrs. Lindsay that while she was watching through the keyhole, these both defendants
114 were in the act of manipulating some of that paper, and they were looking at it with a magnifying glass and chemicals were brushed over what looked like money, I think that definitely ties Reynolds in enough to take him to the jury. I will deny your motion and grant you an exception.

MOTION FOR DIRECTION OF A VERDICT OF ACQUITTAL IN FAVOR OF DEFENDANTS

Mr. AUERBACH. I would like to make another motion to the effect there is no proof in the case, of the possession of the three items, so-called similar bills, as being in the possession of Mr. Lustig and Mr. Reynolds. In view of the fact that although they were in the bag, it has been testified by Mr. Greene for the Government, that these items were all on the bed when he reached there before the return of Lustig and Reynolds, and we have no knowledge as to who put them in the bag.

The COURT. We can't just stop there. At the conclusion of the testimony of Captain Koerner and Detective Murphy, they testified, as did Greene, that they went to the room and these things were in the room, and it is also in the testimony that this room was occupied by these men for some four days prior thereto, and they admitted—according to the testimony, they admitted the ownership of the bags and the occupancy of the room although denying the possession of the impressions but admitting possession
115 of everything else, and they said, according to the testimony, that they were not making counterfeit money but that they were only there for the purpose of showing others how to make counterfeit money. I must deny your motion and grant you an exception.

AFTER SIDE BAR

The COURT. Mr. Richman, has the Government rested?
Mr. RICHMAN. I understand all the evidence is in?
The COURT. Yes.
Mr. RICHMAN. The Government rests.

CASE FOR THE DEFENDANTS

(Mr. Auerbach opens the case for the defendants to the jury.)

EMIL LUSTIG, sworn.

By Mr. AUERBACH:

Q. Emil, where do you live?

A. 251 West 97th Street, New York City.

Q. How old are you?

A. Fifty-four years old.

Q. How many times have you been arrested?

Mr. RICHMAN. I object. He is going to attack his own witness.

The COURT. What is the basis of your objection?

116 Mr. RICHMAN. The basis of my objection is that this is Mr. Auerbach's witness. He certainly is not going to impeach his credibility.

The COURT. No; he is attempting to give the background. I will allow it. Repeat the question.

(Question repeated.)

A. About four or five times.

Q. How many times have you been convicted of crime?

A. One time for selling a money machine.

Q. Are you, at the present time, under bail in any court in the United States?

A. Yes.

Q. In what court and in what city?

A. In the bunco court.

Q. What city?

A. New York.

Q. What are you charged with?

A. Confidence game.

Q. I didn't hear you.

A. Confidence game, swindling, or something.

The COURT. Mr. Lustig, will you try to keep your voice up so the last man in the jury box can hear you.

Q. What do you do for a living?

A. I am a manufacturer of devices, tricks and cards, and things like that.

Q. As a result of a telephone call, did you come to the city of Camden?

117 A. Yes, sir.

Q. Did you know who called you?

A. Yes; Mr. Reynolds.

Q. When did you get here?

A. About a Tuesday, March the fifth or the fourth. I think a Tuesday. I don't know the day.

Q. Where did you go?
A. I went to a saloon. I had the address. I forgot the address.
Q. Who did you meet there?
A. I met Mr. Reynolds and a fellow by the name of Weber; Joe Weber.
Q. After you left the saloon, where did you go?
A. We went to the Whitman Hotel.
Q. In Camden?
A. In Camden.
Q. Did you register?
A. Yes, sir.
Q. What name did you give there?
A. I used the name of Fischer. I registered under a name for another fellow to be able to take somebody to the room.
Q. You wrote Doctor Fischer and Binstock, on the registration?
A. Yes.
Q. Will you please tell the court and tell the jury, just what happened after you registered in the hotel?
A. Well, you please, if I go back a little, a little back to tell you the background. You see I am sick and Reynolds
118 called me on the 'phone and said that I could make a few hundred dollars, to come to Camden and perfect some device. We were selling what everybody knows about, a money machine. It is pretty hard to operate it if you don't know how.
Q. So, as a result of that call, you came to Camden?
A. Yes.
Q. Now, we have you at the Walt Whitman Hotel?
A. Yes.
Q. Tell the court and the jury what happened after that?
A. Well, Binstock and Weber came upstairs after I registered. I don't know what name he wanted to use. He told me it was Binstock. He introduced Weber who brought a brief case; a brown case.
Q. Is that brief case in court today?
A. Yes.
Q. Which one of these two brief cases is it? Is it this one?
A. No. That is mine.
Q. This one?
A. That is right.
Q. What happened after that?
A. There was some stuff in there, paper envelopes and all kinds of things, and Weber asked me, and said, "Listen, do you want to make a few hundred dollars? Would you demonstrate that money machine to me? I said, "You haven't got enough for a set-up." I wrote down some stuff to get.

Q. What did you write down?

A. To get a press, a wooden stick and a short stick. I
119 wrote down for Binstock to get some paper cut. That is all we needed because the man had a glass, the man had the chemicals which, as an ordinary person, you buy for fifteen cents in a drug store; creoline. He brought some water color from a ten-cent store. That is all we used.

Q. You finally got all this stuff together?

A. That was about Friday night.

Q. You finally got all this stuff together that is here today?

A. Yes.

Q. Did you show Weber how to operate this money machine?

A. I explained it to him and he started to practice. Of course, there is no pressing.

Q. You can't make it with a press?

A. That is impossible to press. That is only after making the paper wet to straighten it again, you press it to make it look like the face, greenish, because you put on the top a package of white paper and you turn it around—there is an empty piece of paper on top—you take a print, not with the press, that is impossible, absolutely impossible. You have got to use that long stick in the drawer. It takes about an hour. You have to rule it. I started to explain it to Weber and he started to practice, first, with—he practiced on some magazines and books. Then, he took out three or four hundred dollars because I didn't have no hundred dollars in my possession. He gave one hundred dollar bill to Reynolds.

The COURT. You didn't have any hundred dollar bill?

120 The WITNESS. No, I didn't. I came here without money. Weber gave me some for demonstrating the machine to him.

Q. Before we get into that, tell me about this money machine. What is this device?

A. The device is strictly a swindle. It is for people that wants to put counterfeit money—you can teach them how to make and sell it but it is impossible to make it with that machine. You can take a print. I can teach anybody in two minutes how to make that impression; anybody here in the courtroom.

Q. With that machine?

A. Yes; an impression.

Q. What do you do?

A. To take an impression?

Q. How do you swindle people?

A. You take an impression from a bill. That is all you need the money for. Then, you develop the chemicals as this is and it transfers—but it is impossible to transfer it. I was arrested eleven times on a suspicion of counterfeiting by some other public body eleven times——

Mr. RICHMAN. I object to this testimony as to how many times he was arrested out of town.

A. (Continuing.) I was not arrested. I never was arrested for counterfeiting.

Q. Tell me about this scheme. I am interested in how you work this money machine?

121 A. Well, the money machine is a simple thing. Everybody knows it is in the papers or magazines. I just got a magazine. You take a five or a hundred dollar bill and you put it in the press but the prints are underneath, or the impression. When you take the money out, you turn the package what you get around, and there is the print. Now, you put ordinary paper which Reynolds had got in a store for fifty-five cents, put it in the machine and take this impression, and you turn it around again, and here comes out money, real money, which looks like good money. Now, a man thinks he can do it, naturally. I didn't come here to swindle anybody. I am sick. The last four years I was only convicted once for selling one of these machines. I admitted it. I am sorry I did it. I been sick the last two years. I can show that I am going to a clinic every week twice a week. I just came here to make a few dollars. I am living in a seven dollar room. I got pawn tickets for my personal clothes.

Q. Did you show Weber how to operate this flimflam game?

A. Yes.

Q. He paid you?

A. He gave me five hundred dollars in small bills and one hundred and fifty dollars expenses. He said that he was very satisfied and he was going to pick up that machine on Sunday night when I was arrested. The officers and naturally Mr. Greene they wanted to get the third person so bad, and I said, "Why?" They said, "Because he has got the rest of the stuff." I said, "What stuff?" He said, "Because of the counterfeiting." He said,

122 "You took part of the stuff out of here."

Q. Who said that?

A. Mr. Greene and the Chief of Police. He said, "Where is the other stuff?" I said, "There is no other stuff." He said, "Where is the bill you took the stuff from?" I said, "The biggest bill I got is a ten dollar bill." Now, they asked Reynolds and Reynolds has got a hundred dollar bill from Weber, a brand new one. They investigated that bill and Mr. Greene said, "There is no print taken from this. I don't know how they could use it in making counterfeit money." I never admitted counterfeiting because I know you can get fifty years. If I was counterfeiting, I would not get a little room in Camden to do it.

Q. Now, Mr. Lustig, did you make an impression of these three bills?

A. No; I didn't.

Q. When you were arrested on Sunday in your room, did you tell the Captain of Detectives and Mr. Greene that those bills weren't yours?

A. Yes, sir.

Q. Did you admit ownership of the other items?

A. Only the brown bag. I brought one shirt and one pair of socks. I intended to stay one or two days because I intended to go to the hospital. I had that bag open. There was a brown shirt. I just got a shirt, and a pair of socks.

Q. When you left the room at three-thirty that Sunday afternoon, was that stuff in the brief case?

A. No; Weber was in the room. He had the stuff. He
123 was experimenting with the stuff.

Q. When you left the room, Weber was still there?

A. Yes.

Q. Who went with you?

A. I went with Reynolds to get something to eat and get some beer.

Q. Where did you go?

A. He took me in the county. I don't know Camden.

Q. When did you get back?

A. Oh, about six o'clock .

Q. When you got back, who was in the room?

A. About four or five detectives with revolvers and pistols.

Q. They asked you whether this stuff was yours?

A. Well, I don't know. I was excited. One of them had a pistol on me and one of them had a pistol on Reynolds.

Q. Will you now say that this paraphernalia that is here can that be used to make impressions of genuine money?

A. You can take an impression of any kind of paper, any kind of paper, that is, money, with creolin.

Q. How about this press?

A. That had nothing to do with it.

Q. It has been testified——

A. That is a money box. That is where you switch. That is a device. You turn it around and here comes money out, and when you turn it around again here comes the money. Naturally you leave it in for an hour to make it look like the genuine thing, but a smart person would not ever be fooled.

Q. Have you been able to get people who weren't so smart
124 to invest in this thing?

A. No, sir. I might say there was a fellow came to me in Chicago. I will tell you why I was convicted——

Mr. RICHMAN. I object.

The COURT. I think we are far afield.

The WITNESS. I just want to——

The COURT. No, Mr. Lustig.

Q. Did you make these impressions that were found in your room?

A. No, sir. I could not make them. I can prove that because I am paralyzed and you need a lot of strength to make them. It takes a very strong man to make an impression.

Q. Do you make it with this press?

A. No.

Q. What do you make it with?

A. That long stick, and the little round stick. I can prove it in court.

Mr. AUERBACH. That is all. Cross-examine.

Cross-examination by Mr. RICHMAN:

Q. These exhibits here, the G–7, all these bottles, they are yours aren't they?

A. Two of them are mine.

The COURT. Two of them.

The WITNESS. I will show you. He used creolin. Wait a minute. How did the liquid come for all these bottles?

125 The COURT. The three of them?

The WITNESS. Yes, the green one.

Q. You are referring there to G–7h, G–7f and G–7c. Now, these brushes and the eye dropper, are they yours?

A. Yes, sir.

Q. Those and the impressions are they yours?

A. No, sir.

Q. Whose are they?

A. They belong to Weber.

Q. How about these tweezers; these two sets of tweezers?

A. Yes, sir.

Q. How about these other bottles; who owns them?

A. Weber; Joe Weber brought it.

Q. And left them in your room?

A. Yes, sir. Here is a pen.

Q. How about this little sponge?

A. Belongs to me.

Q. All of this stuff in this tray either belongs to you or Weber and was all kept in your room?

A. Yes, sir.

Q. You knew it was there?

A. Yes, sir.

Q. And Reynolds knew it was there?

A. Yes, sir.

Q. Now, about this wooden press, is that yours?

A. No; Weber brought it. I told him to have it made. I wrote down some items.

Q. You told him how to have this made?

126 A. He knew that, sir. He knew practically the whole thing of the money machine. He didn't know how to operate it. I came here to explain how to operate it.

Q. What is Weber's first name?

A. Joe.

Q. Where did he come from?

A. In Philadelphia.

Q. Where did he live?

A. In Philadelphia.

Q. Where?

A. I don't know. He is a friend of Reynolds.

Q. Did you ever see him before?

A. No.

Q. When is he supposed to have brought this press to your room?

A. The next day when I checked in I wrote him down a lot of items to get in Philadelphia, the press, the water color, some paper to get, a lot of items.

Q. This was in your room from the day you got here until the day you were arrested?

A. No; he brought it Friday; Saturday noon he brought it.

Q. It was there in your possession from Saturday noon until the day you were arrested, that is, Sunday night?

A. Yes.

Q. Reynolds knew it was there?

A. Yes.

Q. How about this stick marked "G–13," is that yours?

A. No.

127 Q. How did that get into your room?

A. Weber had it with him when he brung it in at the same time when he brought the press.

Q. So, it was in your possession from Friday noon——

A. Saturday noon.

Q. (Continuing.) To Sunday night?

A. And the little stick, too.

Q. Now, these two things, G–13 and G–14, with them you can make impressions, can't you?

A. Well, I think I could.

Q. How long were they in your room?

A. About twenty-four hours.

Q. How many impressions did you make with them?

A. Me?

Q. Yes.

A. I didn't make any impressions because I told you I am not strong enough.

Q. Who did make them?

A. Weber.

Q. Were you there?

A. No.

Q. Where were you?

A. I was out four or five times eating; in and out.

Q. Didn't you tell Weber how to use them?

A. Yes, sir.

Q. You didn't stay there?

A. It is simple. If I showed you, you could do it.

Q. You didn't stay and watch him do it?

128 A. I don't remember.

Q. You don't know, do you?

A. I don't know. I could not remember.

Q. You could not remember?

A. Because it was so simple. If I told you, your Honor——

Q. How about this glass plate, is that yours?

A. That is mine.

Q. What is this for?

A. It is to lay on the table in case the chemical—not to leave any spots because you see that creolin smells bad.

Q. And all these various bundles of paper, are they yours?

A. No.

Q. How did you get them in your room?

A. Reynolds—I told Weber to have them cut and Reynolds and Weber went out, and they met a fellow by the name of Garfield in a saloon, to have them cut here in town in a little print shop.

Q. And when were they brought to your room?

A. They were brought to my room at the same time with the stick that is here, and the press.

Q. Saturday noon?

A. Yes, sir; about Saturday noon.

Q. So, all these things, the paper, the chemicals, the little round stick, the big stick, the press, the tweezers, and everything was in your room in your possession from Saturday noon to Sunday night?

A. Yes, sir.

Q. And Reynolds knew all about it?

129 A. Yes, sir.

Q. Why did you register under the name of Doctor Edward E. Fischer?

A. Because Weber told me to be careful that he is well known in Pennsylvania. So did Reynolds. He said, "I am known here as a race horse man, a card player, and they might get me on that."

Q. Are you known in town? Are you known as Emil Lustig, in Camden?

A. No.

Q. Why did you register under the name of Doctor Edward E. Fischer?

A. Well, my business wasn't absolutely legal, and I didn't want to implicate myself, if they did something.

Q. Were you ever known as Weber?

A. No; that is, yes.

Q. When?

A. Oh, about eighteen years ago.

Q. Where?

A. In Chicago.

Q. San Francisco?

A. No.

Q. When were you arrested the first time?

A. You mean in America?

Q. The first time. I mean anywhere.

A. Anywhere? I don't remember.

Q. Yes.

A. I don't remember. I used to be a gambler.

129 Q. Wasn't it in 1910, in Vienna?

A. Me?

Q. Under the name of Ludwig Weber?

A. No.

Q. Weren't you pinched over in Austria on October 3, 1914, under the name of Ludwig Weber?

A. No, sir; no, sir. Emil Lustig, everybody knows him in Austria because I was born in England. My father used to be a very big man, and we went to Austria. Everybody knows him.

Q. Weren't you arrested in Vienna in 1915 for fraud, under the name of Ludwig Weber?

A. No.

Q. And in 1917 under the name of Emil Lustig?

A. I was stopped in Vienna in 1917 on account of being a foreigner, and punished.

Q. You were punished?

A. On account of being an American citizen and they gave me a fine of ten dollars.

Q. You were punished?

A. Yes; as undesirable man, no agreement involved.

Q. Weren't you arrested in Chicago in 1925 under the name of Edward Baker?

A. Yes, sir; in a gambling house.

Q. Weren't you wanted by the Salt Lake City police in 1925 as L. E. Weber?

A. For running a gambling house.

Q. Weren't you arrested in a raid in Detroit in 1929, under the name of Oscar Miller?

A. In a book making place, backing horses.

Q. Weren't you arrested in Austria in 1940 for forging money orders, under the name of Emil Lustig?

A. No, sir; never.

Q. Weren't you arrested at San Antonio, Texas, under the name of Doctor Edward E. Fischer, in 1930?

A. No, sir.

Q. Weren't you arrested in Chicago for a confidence game, in 1930, as Doctor Edward E. Fischer?

A. No, sir.

Q. You don't remember?

A. I don't recall. I don't think so. You might have me mixed up with somebody else.

Q. Yes; with Doctor Fischer. Weren't you arrested again in Chicago as Mr. Baker, in November, 1931?

A. Excuse me, I was arrested a lot of times in Chicago for gambling.

Q. You told us you were only——

A. Why don't you say why? Why don't you tell the jury why?

Q. You tell them how many times you have been arrested?

A. I don't remember.

Q. You told us four or five times?

A. That don't mean arrested what you are reading. I was detained, I was only stopped. I wasn't arrested here in Camden.

The COURT. You weren't.

131 The WITNESS. Your Honor, they told me I am not arrested. Mr. Greene told me I am not arrested.

The COURT. Why did you appear before this court and ask for bail?

The WITNESS. Oh, excuse me, your Honor. I mean before I came here. I mean about the detectives took me down to the station and asked me if I am "making book." I don't call this arrested. Is that arrested? I mean they don't have no warrant or anything.

Q. Now, Mr. Lustig, how about Joplin, Missouri, in 1924, weren't you arrested under the name of Otto Berger?

A. I don't remember. This is too long back.

The COURT. Mr. Richman, I think we have gone far enough into that.

Mr. RICHMAN. I would like to go just a little further.

Q. Weren't you arrested in Chicago in 1936 for counterfeiting?

A. No.

Q. What?

A. No, sir.

Q. I want to ask you again: On the sixteenth of November, 1936, weren't you arrested by the United States Marshal at Chicago, for counterfeiting?

A. No, sir.

132 Mr. RICHMAN. Your Honor please, I would like to ask the witness whether he understands "arrest" and "conviction" to be synonymous.

The COURT. Were you ever apprehended by a United States Marshal in Chicago or any Federal agent in Chicago, on a charge of counterfeiting?

The DEFENDANT. Excuse me, your Honor. Can I explain it?

The COURT. Do you understand my question?

The DEFENDANT. I was arrested for having a supply of one-dollar bills in a hotel room.

The COURT. By whom?

The DEFENDANT. By a city detective.

The COURT. Did he subsequently turn you over to the Federal authorities?

The DEFENDANT. Yes, sir; and I was acquitted. They didn't even listen to the men because it was found in a hotel room, and they said that does not mean—that is not counterfeiting. That is for simulating United States currency I was arrested for, but not for counterfeiting.

Q. Finally, they got you in New York for selling a money machine?

A. What?

Q. They arrested you in New York for selling a money machine?

A. No, sir.

Q. Well, what——

133 A. No, sir.

The COURT. Didn't you tell us you were under bail at the present time?

The WITNESS. Your Honor, I was arrested with a fellow. He had in his possession about fifty dozen nylon stockings.

The COURT. Didn't you tell us you were under bail at the present time, in New York City?

The WITNESS. Yes, sir.

The COURT. What was that for?

The WITNESS. The fellow had fifty dozen——

The COURT. What are you charged with?

The WITNESS. Grand larceny.

Q. Didn't you do eighteen months in jail personally, and just get out last December?

A. Yes, sir.

Q. What for?

A. Selling one of these money machines. That is the only time I ever was convicted.

Q. All right, Mr. Lustig. As I understand your testimony, it is possible to make an impression of money with the materials you had in your room?

A. Oh, yes; you can do it. I wasn't supposed to do that.

Q. You knew how to use them?

A. Yes.

Mr. RICHMAN. That is all.

134 The COURT. Mr. Lustig, I don't want to put any words in your mouth; I didn't want to be unfair to you in any way, and if this is not exactly so, you say so, but do I understand your testimony to be that you were showing Weber how to do this proposition?

The WITNESS. Yes, sir.

The COURT. And you were telling Weber that this was a scheme whereby he could make counterfeit money?

The WITNESS. No.

The COURT. But that you actually knew you could not do it?

The WITNESS. Nobody could do it.

The COURT. You knew in your mind that you could not do it?

The WITNESS. Yes, sir.

The COURT. But that you told Weber you could do it in order to sell him the machine?

The WITNESS. No, no, your honor. Weber knew the whole business but he didn't know the inside of the business. He didn't know the operation of the machine because that is very complicated.

The COURT. That is what he paid you the $500 for?

The WITNESS. Yes.

The COURT. To find out the inside operation of the machine?

135 The WITNESS. The inside—to show the man how to play my cards. I know five or six of these devices.

By Mr. RICHMAN:

Q. But Mr. Lustig with this press and this ruler, and all the paper and necessary chemicals, if you had the strength, you could make some impressions?

A. Yes; if I had the strength.

Q. You know how to tell somebody else?

A. Yes.

Q. You told Weber how to do this?

A. Yes.

Q. You told Reynolds?

A. He was in the room. I don't know whether I told him. I don't want to get him in.

Mr. RICHMAN. That is all.

By Mr. AUERBACH:

Q. I show you a comic book "Super Rabbit"——

A. I am sick. I don't feel like looking. This is a serious thing to accuse me of making counterfeit money. I can get fifteen years.

The COURT. We are not concerned in the trial of this case whether you can get fifteen days or fifteen years, or anything else, Mr. Lustig. To my recollection you have said it is a serious thing two and maybe three times, and don't say it again.

Q. In this comic book, is this duplicating machine based on the same principles that the money machine you showed Mr. Weber is based on?

136 A. Yes, sir.

Mr. RICHMAN. I object. How is that material?

The COURT. I don't see how it is material.

Mr. AUERBACH. It might be true that this money machine is so prevalent that it is in the comic strips too.

Mr. RICHMAN. Mr. Auerbach is trying to make light of a very serious charge.

Mr. AUERBACH. That is all.

The COURT. You may step down.

Mr. AUERBACH. That is our case, if your Honor please.

The COURT. Any rebuttal?

Mr. RICHMAN. No.

137 In United States District Court

[Title omitted.]

Charge of Court

Per MADDEN, U. S. D. J.:

Ladies and gentlemen, we now come to that point of the case where after a full and fair consideration of all the evidence adduced before you coupled with the instructions of law as I will give them to you in the charge, you will retire and deliberate upon the guilt or innocence of the defendants as charged in the indictments.

These defendants are charged in two indictments found by a Grand Jury, namely, 3829c and 3875c, charging them with certain offenses. Now, I will presently read these to you, but before doing so, I want to explain that the mere fact that a Grand Jury has seen fit to indict these defendants and present these charges against them that that creates absolutely no burden on these defendants.

It creates no inference in the slightest degree of their guilt. It is merely a formal way of putting down in writing the nature
138 of the charge that the Government brings against these particular defendants. The mere fact that a Grand Jury sat and considered this is not to be any inference as to the guilt or innocence of these particular defendants. I also call your attention to the fact that in the Grand Jury only one side of the case is heard.

In indictment 3829c, there are three counts. The first count says that on or about the 10th day of March, 1946 in the city of Camden and district of New Jersey, the defendants—and it names these defendants, not under the authority and direction of the Secretary of the Treasury or other proper officer of the United States, did unlawfully and feloniously print, make and execute, cause to be printed made and executed, and aid in printing, making and executing and engraving, print and impression in the likeness of a true and genuine obligation of the United States and parts thereof, to wit, a Federal Reserve bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania of the denomination and value of $100.00, the face and back of which said obligation are of the following tenor and effect, and then they are set forth in the body of the indictment, contrary to law.

The second count is at the same time and place, these defendants not under the authority and direction of the Secretary of the Treasury or other proper officer of the United States did unlawfully and feloniously print, make and execute, cause to be printed, made and executed and aid in printing, making and exe-
139 cuting an engraving, print and impression in the likeness of a true and genuine obligation of the United States and parts thereof, to wit, a Federal Reserve bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania, or silver certificate of the United States, the exact identity of said note being to the Grand Jurors unknown, of the denomination and value of $10.00, the back of which said obligation is of the following tenor and effect. and it is set forth in the indictment, contrary to law.

The third count is that at the same time and place namely, on the 10th of March, at Camden, these defendants did unlawfully and feloniously have in their control, custody, and possession the following:

(1) An engraving, print, and impression of the face of a Federal Reserve bank note of the denomination and value of $100.00, which said engraving, print and impression is more particularly set forth in count 1, and is made part hereof.

(2) An engraving, print and impression of the back of a Federal Reserve bank note of the denomination and value of $100.00, which said engraving, print and impression is more particularly

set forth and described in count 1 of this indictment and is made part hereof.

(3) An engraving, print and impression of the back of a Federal Reserve bank note or silver certificate, the exact identity of said impression being to the Grand Jurors unknown, of the
140 denomination and value of $10.00, which said engraving, print or impression is more particularly set forth and described in count 2 and is made part hereof.

(4) Wooden press.

(5) A package of 100 sheets of bond paper.

(6) Four packages containing 100 sheets of bond paper.

with intent to use those things hereinbefore particularly described and to suffer same to be used in forging and counterfeiting obligations of the United States and parts thereof, contrary to law.

The second indictment, namely, indictment 3875c—both of these indictments have been consolidated for the purposes of this trial—in the first count says that on or about the 10th day of March at Camden, this district, these defendants not under the authority of the Secretary of the Treasury or other proper officer of the United States did unlawfully and feloniously have in their possession and custody an obligation and security made and executed in part after the similitude of an obligation and security issued under the authority of the United States, to wit, a Federal Reserve Bank note of the Federal Reserve Bank of Philadelphia of the denomination and value of $100.00, the face and back of which are of the following tenor and effect, and then that is set forth in the indictment, with the intent to use same contrary to the form of the statute in such case made and provided, and against the
141 peace and dignity of the United States.

The second count is that on or about the 10th day of March 1946, at Camden, these defendants, not under the authority of the Secretary of the Treasury or other proper officer of the United States did unlawfully and feloniously have in their possession and custody an obligation and security made and executed in part after the similitude of an obligation and security issued under the authority of the United States, to wit, a Federal Reserve bank note of the Federal Reserve Bank of Philadelphia, Pennsylvania, or silver certificate of the United States the exact identity of said note being to the Grand Jurors unknown of the denomination and value of $10.00, the back of which said obligation is of the following tenor and effect, and then it is set forth in the indictment, with the intent to use the same contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

You will take into the jury room with you the indictments that

I have just read to you together with the other exhibits in the case, for your aid in reaching a conclusion as to the guilt or innocence of these defendants or of each of them.

Before going any further, I want to charge you that you are the sole judges with relation to the facts. You are to determine them from what you concede is the believable testimony taking into consideration the probabilities and the attitudes of the
142 witnesses. If, according to your recollection, the court or counsel errs in its or their statement of any evidence whether disputed or undisputed, or if the court or counsel assumes or states the existence of presence in the case of evidence that is not actually in the case, not actually before you, you should disregard the recollection of the court or counsel, and rely solely upon your recollection and not upon the recollection of the court or of counsel.

In weighing the evidence, you have the right to examine into the credibility of the various witnesses, and in so doing, you may take into consideration their demeanor on the witness stand, their interest in the outcome of the case, the vagaries of the human mind in its attempts to recall past matters, the opportunities of the witnesses to see and hear what may have taken place, and the likelihood of their making particular note or recalling particular events. You may then accept the credible and reject the incredible.

This is naturally a serious charge, as is any criminal charge and is to receive your full, fair, and deliberate consideration. You are not to be swayed by passion or prejudice or, on the other hand, by sympathy.

If, during the course of the trial, I have argued with either Government counsel or defense counsel, or I have slapped their wrists from a legal standpoint, you are not to consider that because counsel must argue the case and present the case in their
143 own light for the betterment of their own point of view and the rule of law involved. So, you are not to take the repercussions of the court or of any counsel in any degree into your consideration of the guilt or innocence of the defendants, and the best way I can tell you how to perform your duties is to pay attention strictly to your oath " that you and each of you do solemnly swear that you will well and truly try this issue and a true verdict render, according to the evidence, so help you God."

Now, this is a criminal matter, and in all criminal matters, it is necessary for the Government to prove the guilt of the defendants beyond a reasonable doubt. In other words, when the defendants come into this court room charged with crime, they walk in with a cloak of innocence surrounding them. That cloak of innocence is not any imaginary figment; it is a real thing. It places upon the Government the burden of proving the guilt

of the defendants of the offenses charged in these indictments beyond a reasonable doubt. Now, what is a reasonable doubt? A reasonable doubt is not a mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. In other words, if after a fair and deliberate consideration of all the testimony, you feel that the defendants, both of them or either one of them,
is guilty beyond a reasonable doubt, and that the Govern-
144 ment has so proven it, then it is your duty to convict. If,
however, there exists in your mind, a reasonable doubt, as I have explained it, of course, the Government has failed to prove it beyond a reasonable doubt, then it is your duty to acquit.

Now, in this particular case, there is some testimony as to reputation or criminal convictions in the past. You are not to take such records of previous convictions into consideration as to the fact that the defendant would commit the act as charged here but such testimony is adduced solely for the purpose of affecting the defendant's credibility as a witness, and that is the light in which it is received, and that is the only light in which you are to accept it.

Another thing, as you have in this particular case, two individual defendants, you must consider their cases separately and individually. One of these defendants has seen fit to take the stand in his own behalf, in his own defense. The fact that the other defendant has not seen fit to go on the stand is not to raise any presumption in your mind against him because by his mere appearance here and his entry of a plea of not guilty, he puts the Government at issue. He creates the issue and it is then incumbent upon the Government to prove him guilty beyond a reasonable doubt.

I have read to you the indictments and the pertinent parts thereof. I shall now read to you the pertinent parts of the statute that Congress has adopted, enacted into law as the law pertaining
to this particular case. "Whoever shall have in his control,
145 custody or possession any plate, stone or other thing in any
manner made after or into the similitude of any plate, stone or other thing from which any such obligation or other security has been printed with intent to use such plate, stone or other thing or to suffer the same to be used in forging or counterfeiting any such obligation or other security or any part thereof, or whoever shall have in his possession or custody except under authority from the Secretary of the Treasury or other proper officer any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued un-

der the authority of the United States, with intent to sell or otherwise use the same, or whoever shall print, photograph or in any other manner make or execute or cause to be printed, photographed, made or executed or shall aid in printing, photographing, making or executing, any engraving, photograph, print or impression in the likeness of any such obligation or other security or any part thereof or shall sell any such engraving, photograph, print or impression except to the United States or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print or impression except by direction of some proper officer of the United States, shall be guilty of a crime."

Now, you are not to concern yourselves with the amount of time to which the defendants, if found guilty, could be sen-
146 tenced or the penalty that could be imposed. It has been brought into this case by defendant Lustig that he could suffer a certain penalty. You are not to concern yourselves with that. You are to concern yourselves solely with the guilt or innocence of these defendants or each of them as charged under these indictments and the law as I have given it to you.

Now, so that you might have a full understanding, I think it would be well if I would charge you on the law of aiding and abetting. Under the statutes of the United States, anyone who aids or abets in the commission of a violation of the law is guilty just the same as a principal, just the same as though he did it himself. I shall read you the statute: "whoever primarily commits an act or aids, abets, counsels, commands, induces or procures its commission is a principal."

There are certain phases of circumstantial evidence in the matter, and, I think, I should charge you in relation to circumstantial evidence. Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists, which is sought to be established. It must be such evidence as to exclude every reasonable doubt of the guilt of the defendant and if it does not do so, or if you believe the circumstances to be as consistent with innocence as with guilt, then it is your duty, and you must acquit the defendant.

147 You, therefore, in this particular case will consider all of the evidence. You will consider it as to each individual defendant.

You can render anyone of three verdicts. You can either find both men guilty, if you feel that the Government has proven the charge beyond a reasonable doubt or if you feel that such proof

has failed, you can acquit both defendants or you can acquit one and convict the other.

You will consider the evidence as it has been adduced here as to each particular defendant, as it applies to him.

It is necessary for the purpose of finding a verdict that all members of the jury agree upon that verdict. It is your duty to agree if possible. In conferring together, you are to pay a proper respect to each other's opinion and examine such beliefs in a spirit of fairness and candor. This does not mean that any member of the jury shall yield his well grounded opinion or violate his oath, but it means he shall not stand out in an unruly or obstinate way. Members of a jury should always closely scrutinize the facts from their own standpoint and the viewpoint also of their fellow members of the jury. While, undoubtedly, the verdict of a jury should represent the opinion of each individual jurror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unity by a comparison of views. A juror should listen with deference to the arguments of his fellow jurors, and with a distrust of
148 his own judgment if he finds the large majority of the jury taking a different view of the case from that which he does himself.

With those instructions and with the exhibits, you may retire.

149 *Proceedings after return of jury*

(Jury polled by Clerk. All answer present.)

The CLERK. Members of the jury, have you agreed upon a verdict?

The JURY. We have.

The CLERK. Who shall speak for you, the foreman?

The JURY. The foreman.

The CLERK. Madam Foreman, as relates to indictment 3829c as to defendant Emil Lustig, how say you? Do you say you find the defendant guilty or not guilty on the first count of that indictment?

The FOREMAN. Guilty.

The CLERK. As relates to the defendant Emil Lustig on the second count of that indictment, how say you? Do you say you find the defendant guilty or not guilty on the second count of that indictment?

The FOREMAN. Guilty.

The CLERK. As relates to the defendant Emil Lustig on the third count of that indictment, how say you? Do you say you find the

defendant guilty or not guilty on the third count of that indictment?

The FOREMAN. Guilty.

The CLERK. Now, defendant Emil Lustig on indictment 3875c, and as to the first count of that indictment, how say you? Do you say you find the defendant guilty or not guilty on the first count of that indictment?

150 The FOREMAN. Guilty.

The CLERK. As relates to the defendant Emil Lustig on the second count of that indictment, how say you? Do you say you find the defendant guilty or not guilty on the second count of that indictment?

The FOREMAN. Guilty.

The CLERK. Now, as to defendant Thomas Edward Reynolds on indictment 3829c, as he stands charged in the first count, how say you? Do you say you find the defendant guilty or not guilty on the first count of that indictment?

The FOREMAN. Guilty.

The CLERK. As to defendant Thomas Edward Reynolds on indictment 3829c, as he stands charged in the second count, how say you? Do you say you find the defendant guilty or not guilty on the second count of that indictment?

The FOREMAN. Guilty.

The CLERK. As to defendant, Thomas Edward Reynolds, on indictment 3829c as he stands charged in the third count, how say you? Do you say you find the defendant guilty or not guilty on the third count of that indictment?

The FOREMAN. Guilty.

The CLERK. As to defendant Thomas Edward Reynolds on indictment 3875c as he stands charged in the first count,
151 how say you? Do you say you find the defendant guilty or not guilty on the first count of that indictment?

The FOREMAN. Guilty.

The CLERK. As to defendant Thomas Edward Reynolds on indictment 3875c as he stands charged in the second count, how say you? Do you say you find the defendant guilty or not guilty on the second count of that indictment?

The FOREMAN. Guilty.

The COURT. In other words, ladies and gentlemen, you find the defendants Emil Lustig and Thomas Edward Reynolds guilty in all counts of all charges?

The JURY. Yes, your Honor.

The COURT. And so say you all?

The JURY. Yes.

The COURT. Are there any requests, Mr. Auerbach?

Mr. AUERBACH. No requests.

The COURT. You are discharged with the thanks of the court, and you will report tomorrow morning at a quarter to ten o'clock. Thank you.

152 *Proceedings of sentence*

Mr. RICHMAN. I move sentence as to both defendants.

The COURT. I will hear you. Do you have any objection to the imposition of sentence?

Mr. AUERBACH. No, I don't. I would like to say with regard to Mr. Reynolds that I think it is pretty well established that Mr. Reynolds was a sort of middle man in this thing. I don't think he is involved in this as a practice. He is guilty of, perhaps, bringing two people together to formulate some sort of scheme. I don't think he is personally involved in counterfeiting as such which is the sum and substance of this indictment, and I would like to ask consideration for him.

Your Honor, with regard to Mr. Lustig, I don't know that there is anything special that can be said. Your Honor is as familiar with the situation as I am. It is not my province to go beyond the province of the jury, and that is not my intention. So far as this court is concerned, this is the first offense for either of these defendants, and as such I think some consideration might be shown to them.

The COURT. At this time, Mr. Auerbach, I would like to say that you handled this case at the appointment of the court. I appreciate the service that you rendered the court and I thank you for it. You handled the case well, presented it well considering what you had to work with.

153 Lustig, do you have anything to say before I impose sentence upon you?

Mr. LUSTIG. Yes; I would like to say that I am not guilty on that charge. I never intended—I never in my life intended——

The COURT. The jury has found you guilty and I certainly can't help but agree with the verdict of the jury.

Mr. LUSTIG. We are all human, and we all make mistakes. I am not afraid of nothing but I am innocent. This thing I didn't have in mind. I been arrested eleven times for the same thing. You can ask Mr. Gallagher, the Chief of the Secret Service in Chicago. I was arrested for the same thing.

The COURT. You know too much about money. Its making and its monkeying around, and everything else. You are 54 years of age; you are old enough to know better.

Mr. LUSTIG. It is 100 years on the record, and there are four thousand people in the country.

The COURT. You been arrested so many times you can't even remember.

Mr. LUSTIG. It has nothing to do with counterfeiting.

The COURT. You haven't learned all these things about money without knowing a whole lot more in the court's opinion. I see no further purpose to be served in dealing—in delaying
154 this matter or asking the probation system for a report on you. I will now impose sentence of the court——

Mr. LUSTIG. Your Honor, can I say something else?

The COURT. Yes.

Mr. LUSTIG. You can check up on it. If I was going to do counterfeiting I would not do it in a small room in Camden. To make counterfeit money, it takes eight or ten months to make a plate. I know all the things to do in counterfeiting money. I read about it and studied it. There is no way on earth to make counterfeit money without a plate or stone. There is advantage to making counterfeit money without a stone, and the Secret Service of the United States knows that. Mr. Gallagher, the Chief of the Secret Service in New York, the Chief of the Secret Service in Cleveland, in Detroit have had stuff like this. They got ten thousand dollars worth. They have prints for them. It takes plates to make it and they always throw the case out. They give you three or four months in Texas for simulating United States currency. I know everything about transferring as I am a chemist. You cannot transfer ink. That is impossible. You cannot take a print with a press, that is impossible. With this material, it is impossible to make it. I will leave it to anybody here. I don't know what you will do. I am here for punishment but I am innocent.

155 The COURT. Well, the jury has found you guilty after what I consider a fair trial. I tried to be as fair as I could during the course of the trial——

Mr. LUSTIG. Thank you, your Honor.

The COURT. Even though I might have had my own personal ideas as to your guilt or innocence, but, nevertheless, that is the way the Government works. I think you got a fair trial, and, I think, everybody else including the jury gave it consideration. So far as the court is concerned, you are guilty, and you are

going to be sentenced. After a full and fair consideration, the sentence of the court is:

On indictment 3829c that you be committed to the custody of the Attorney General of the United States or his duly authorized representative for a period of five years.

On indictment 3875c that you be committed to the custody of the Attorney General of the United States or his duly authorized representative there to be committed to the proper institution for a period of three years, the three years on indictment 3875c to be consecutive, to run consecutively to the five years on indictment 3829c. That is all.

Mr. Reynolds, do you have anything to say?

Mr. REYNOLDS. I am perfectly innocent. I don't know what it is all about.

The COURT. I can't believe that. I think you knew what it is all about. I think you got to monkeying around. You know as well as I do that you can't deal with currency of the Govern-
156 ment. You know it now, I guess, a little better than you knew it before. You know what impresses me in this case more than anything else is that you big time operators had to come to little dinky Camden to get caught. I guess a thing like this could not happen in New York because the maid as she was going along could not look through adjoining keyholes in New York to see what was going on. I know that much about hotel rooms in New York, but here in little Camden, a hick town, a big shot gets caught. That is certainly the irony of fate. I guess the place where you belong is where you will be under guard and surveillance, and if you were there, you might not have let down the bars and been with Mr. Lustig. Mr. Reynolds, you have been convicted more for your association and company than anything else, but you won't be sentenced for that. You will be sentenced on what the court feels is a proper verdict coupled with your actions in this case.

Mr. RICHMAN. May I make a representation to your Honor with respect to Mr. Reynolds? I have discussed this matter with the Secret Service. Insofar as Mr. Reynolds is concerned, we are not convinced that he is a responsible operator in counterfeit money. We are more or less of the opinion that he arrived in time for the ride.

The COURT. Yes; I think we all think that.

Mr. LUSTIG. Yes; he is innocent too, your Honor. He doesn't know. He never knew what it is all about. He never seen a money box in his life.

157 The COURT. He knew there was a flimflam around currency.

Mr. LUSTIG. He never seen a print.

The COURT. You keep quiet. Reynolds, be honest with me. What did you do?

Mr. REYNOLDS. Just as Mr. Lustig testified this party was willing to give up $500.00.

The COURT. How about the counterfeit money?

Mr. REYNOLDS. That is something I know nothing about.

The COURT. This man was to pay that because he was going to learn how to counterfeit.

Mr. REYNOLDS. I got $150 to $200.00 out of it.

The COURT. Do you think it is right to deal with the Government's currency?

Mr. REYNOLDS. No; I never done that before.

The COURT. Under this conviction, I could give you five times fifteen which amounts to seventy-five years. That is the ridiculous situation in your life. I have nothing like that in mine. I think you are guilty as the jury has found you, but, I think, you need to be straightened out. Any man who has not been home in fifteen years needs to be straightened out.

Mr. REYNOLDS. Oh, yes, I have been.

The COURT. You told me if I remember correctly in this
158 court you had not been home for fifteen years, or somebody said that.

Mr. REYNOLDS. My wife and I lived together for three or four years in New York, in Albany before I came here. Her apartment was rented out.

The COURT. Do you support her?

Mr. REYNOLDS. I sent her money.

Mr. LUSTIG. Yes.

The COURT. You keep out of it, Lustig. He is only in trouble because of you.

Mr. LUSTIG. I want to get him out.

The COURT. You can't get him out. You have already got him in. The jury said that. Reynolds, your case gives me concern. I don't like to impose sentence on anybody but, nevertheless, I am satisfied you need a certain amount of institutional and correctional guidance, but after that you go straight. I think I have worked out what, I think, is right. You will have to accept it whether you agree with me or not. It is the sentence of the court in the case of Thomas Edward Reynolds on indictment 3829c, that he be committed to the custody of the Attorney General of the United States or his duly authorized representative there to be placed in a proper institution for a period of one year and one day. On indictment 3875c, the court suspends the imposition of sentence on that indictment, and places you on probation for a

period of five years, the period of probation is to start when you get out of jail on indictment 3829c. That is all.

159 United States Circuit Court of Appeals for the Third Circuit

No. 9191—October Term 1946

UNITED STATES OF AMERICA

vs.

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER, APPELLANT

Appeal from the United States District Court for the District of New Jersey

Argued November 19, 1946

Before GOODRICH, McLAUGHLIN, and KALODNER, Circuit Judges

Opinion

(Filed February 10, 1947)

By McLAUGHLIN, Circuit Judge.

The appellant and Thomas E. Reynolds (who does not appeal) were convicted under two joint indictments based on R. S. Sec. 5430; March 4, 1909, c. 321, Sec. 150, 35 Stat. 1116; 18 U. S. C. Section 264. Counts 1 and 2 of the first indictment charge them with counterfeiting obligations of the United States. Count 3 charges possession of certain materials with intent to use them for counterfeiting. Both counts of the second indictment
160 charge possession of obligations executed in part after the similitude of obligations of the United States. Appellant was sentenced to five years on the first indictment and three years on the second with the sentences to run consecutively.

Appellant's first point is that the conviction was based on evidence obtained by illegal search and seizure.

Briefly, the facts show that a chambermaid in the Camden, New Jersey, hotel where the appellant and Reynolds were stopping, became suspicious of their actions. She notified the hotel management who in turn notified the city police. As the circumstances indicated a possible violation of currency laws, the police informed Federal Agent Greene. The latter made such investigation as he could at the time and found no evidence of counterfeiting. He then went to police headquarters and so advised Detective Captain Koerner, at which Greene's official interest in the case ceased.

Koerner checked with one Sergeant Murphy regarding the appellant and Reynolds, who was registered under the name of Binstock. After that he went to the hotel himself and checked the register. Following this, based primarily on his independent recollection of Reynolds, alias Binstock, as refreshed by Sergeant Murphy, he obtained warrants for the arrest of both Lustig and Reynolds for alleged violation of a Camden ordinance requiring all criminals in the city over twenty-four hours to register with the city authorities. Accompanied by three or four other police officers, Captain Koerner went to the hotel room of Lustig and Reynolds. The latter were not in the room at the time. The police took possession of certain property in the room contained in three brief cases. This consisted of trays, pliers, bond paper, paper cut to actual size of United States currency, various small bottles with liquid in them, tweezers, what appeared to be castors wrapped in cloth, a small piece of sponge, a magnifying glass, a piece of plate glass, a ruler, a cylinder of wood with cloth wrapped around
161 it, an impression of the face of a Federal Reserve note for $100, what appears to be the reverse side of a $100 Federal Reserve note, and an impression of the reverse side of a $10 certificate. Greene, who had remained at headquarters "curious to see what they would find" was telephoned by Koerner after the latter had discovered the above articles and went over to the hotel room. He looked at the various items which by that time were lying on the bed and was satisfied that something was going on concerning counterfeiting. Later Lustig and Reynolds came in and were arrested by Captain Koerner under his city warrant. Captain Koerner testified that Lustig said at the time "they were not here to pass counterfeit money. They were here to sell the idea how to make it, make an easy living." The next day Agent Greene, after consulting with the Assistant District Attorney, signed a federal complaint against Lustig and Reynolds. The indictments under consideration followed.

It is, of course, thoroughly settled law that evidence obtained through wrongful search and seizure by state officers who are cooperating with federal officials must be excluded. Gambino vs. United States, 275 U. S. 310, 314. So too where the search has been instigated by federal agents. Crank vs. United States, 8 Cir. 61 F. 2d 981. And the Fourth Amendment should be liberally construed in favor of the individual. Boyd vs. United States, 116 U. S. 616, 635. But mere participation in a state search by a federal officer does not render it a federal undertaking. Byars vs. United States, 273 U. S. 28, 32. The last cited case goes on to hold that "We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account."

The present facts do not go as far as those in the Byars decision. Here it is at lease questionable from the record that there was any improper seizure by the Camden police. We do not have the benefit of the particular city ordinance
162 other than the reference to it in the testimony. The evidence shows that the Camden police identified Reynolds as a tout or race horse bookie.[1] There is no testimony as to what the conclusion as to Lustig then was, but Lustig on the stand admitted to at least one prior conviction, to a great number of arrests and that he was under bail in New York at the time. Reynolds did not testify. There is nothing in the record to show what happened to the complaint under the municipal ordinance.

The controlling decision in this Circuit is Miller vs. United States, 50 F. 2d 505. That case follows the general principles above outlined. The alleged illegal seizure and search concerned an automobile truck loaded with beer. We said, page 507:

"No federal official was present when the state troopers seized the truck. There is no evidence that while federal officers were watching the brewery and state officers were watching the Tallow Factory there was any contact, relation or co-operation between the two forces. Nor is there evidence that when later the state troopers made the search, seizure and arrest there was any co-operation between the two sets of officials. So far as the record shows, each was acting independently of the other all the time. True, the government accepted the benefits of the alleged unlawful search and seizure by accepting the truck and its contents when the troopers delivered them at the government warehouse and by using in evidence the property seized, as it could lawfully do unless the state troopers were acting on its behalf. On this point the state troopers testified that they thought they were enforcing the National Prohibition Law (27 U. S. C. A.) But this was merely their personal opinion which alone cannot give a federal character to their action, particularly in view of the fact that Pennsylvania has a state liquor law of its own to be enforced
163 and that the State Constabulary ordered the troopers to this task without any instructions to enforce the federal law. From this evidence we cannot find that the search, seizure and arrest by the State troopers, if unlawful for lack of a warrant and probable cause, were made solely on behalf of the United States or in co-operation with officials of the United States within the meaning of the Gambino decision."

From the facts we think it a reasonable conclusion that the search of appellant's room was in truth a proceeding by the state

[1] Sergeant Murphy testified that he told Captain Koerner, "Well, it doesn't seem possible for men in the counterfeiters' racket, counterfeiting money would be in a public hotel. I said, 'That looks like as there was, and it was possible, that they might be trying to counterfeit race track tickets.'"

rather than an undertaking of Federal Agent Greene to obtain evidence in a manner forbidden by the federal law while at the same time avoiding the consequences by cooperation with the Camden police. There is no evidence of prearrangement or understanding between Greene and Captain Koerner in the obtaining by the latter of the city warrant and his subsequent search of appellant's room. Greene had frankly advised Koerner that he had found no evidence of counterfeiting. From then on the Camden police executive acted on his own initiative. It is true that Greene took advantage of the results, but, as we see it, in legitimate fashion and within the bounds of the cases covering the subject. See also Sloane vs. United States, 10 Cir., 47 F. 2d 889; Milburne vs. United States, 2 Cir., 77 F. 2d 310.

Appellant then argues regarding counts one and two of the first indictment that the evidence proffered to prove the printing of the notes was purely circumstantial, was insufficient and therefore that the Court should have directed a verdict of acquittal on those counts. The chambermaid in the room adjoining that of appellant heard a noise, like glass hitting against glass or metal hitting against metal. As a result she looked through the keyhole of a door entering in Lustig's room. She saw him holding a piece of wet green paper which he tore, giving a piece to Reynolds. It looked like money to her. Then appellant got out a little
164 glass bottle and a little paint brush and laid them down. Then she saw a magnifying glass. She heard one of the men say, "That is enough of them, that is enough of them." Captain Koerner testified that counterfeit money could be made with the equipment he found. An ink expert testified that with phenol, which was among the items found in the room, impressions could be transferred from one paper to another. The impressions of the $100 bills and of the $10 bill above referred to were found in appellant's bag. Lustig, according to Captain Koerner, said that "We are here to make counterfeit money." Clearly the evidence indicated that the jury should pass upon it and just as clearly it supports the verdict upon those particular counts.

Appellant next urges that count three of the first indictment does not state an offense under 18 U. S. C. A. Section 264. The relevant portion of the statute reads:

"* * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof."

It is claimed that none of the articles found in the hotel room come within the requirements of that part of the above language which speaks of possession of "any plate, stone or other thing." Erickson, Koerner, and Greene gave evidence to the effect that the reverse impressions on the paper found in Lustig's room could be transferred to fresh paper in the position which they originally occupied upon genuine currency. Neither Koerner or Greene pretended to know the technical details of such process. Mr. Erickson outlined that process at some length. Admittedly, the United States does not print its obligations by such crude methods. And the interpretation of the statutory "other things" refers to things of the same kind. United States vs. Phez Co., 9 Cir., 28 F.
165 2d 106. Nor can the Court extend that genus in a criminal case. United States vs. Resnick, 299 U. S. 207.

But here the intent of the statute fairly includes all devices by which counterfeit currency may be made. The employment of the terms "plate" and "stone" does not imply that "other things" must be metallic or heavy or elaborate. It means the other things must be capable of the same use. The paper impressions here were testified to as being so capable and the jury accepted that evidence. Whether these impressions could be used to make many counterfeit bills is irrelevant; to make one brings the maker within the express prohibition of the statute.

The offenses charged in the second indictment stem out of that part of Section 264 which reads:

"* * * or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or *in part*, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; * * * shall be fined not more than $5,000., or imprisoned not more than 15 years, or both. (R. S. Sec. 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116)" [Italics supplied.]

Appellant asserts that the government failed to prove possession of an obligation made and executed "in part" after the similitude of an obligation of the United States. The government evidence on this consisted of the three impressions which have been mentioned. All three were reverse impressions. The first was of the face of a $100 bill; the second of the back of a $100 bill and the third of the back of a $10 bill. It is argued that the offense outlined by the statute contemplates possession of a completely executed obligation similar to an obligation of the United States.

Appellant concedes that the proper test to be applied is
166 whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities

issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest. This is sound and the sense of the decisions on the point. United States vs. Weber, 210 F. 973, 976; Minnella vs. United States, 8 Cir., 44 F. 2d 48, 49.

This question was developed very thoroughly by the defense on cross-examination of Federal Agent Greene. The latter said he had been such agent since 1933 and had handled counterfeiting cases since that time, the particularly heavy period for such matters having been from 1933 to 1937. For about five years he was part of a special federal education program, giving lectures to bankers and others in connection with how counterfeit money is made, how it is sold, how it is devised and how it is detected. He said that the three impressions were reasonable facsimiles of the bills which they were intended to imitate. He further said that the impressions are such a likeness or resemblance to United States currency as to be calculated to deceive an honest, sensible and unsuspecting man of ordinary care and observation.[2]

167 In addition to this testimony brought out by the defense, the three impressions had been received in evidence without objection by the defense on this phase of the matter. Nor was there any motion or request to charge in connection with this particular question. Defendant suggests that the Trial Court should have set the verdict aside with reference to the second indictment as against the weight of the evidence. Tested by the rule outlined by the defendant, we think that whether the three impressions were in whole after the similitude of any obligation of the United States was peculiarly a jury question under the facts of this case.

We have carefully examined the other contentions of the appellant and find them without merit.

Affirmed.

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[2] In explaining his reasons for his opinion this witness stated that:

"According to our experience with Secret Service, I have obtained from business men a split ten dollar bill, that is the back of a ten dollar bill that was passed in this manner, it would be folded, you understand. A man could sit in a car and order a dollar's worth of gas, and after the materials had been delivered to the car and the change given before the gas station attendant could see the ten dollar bill.

* * * * * * *

"This man held the ten dollar bill. He held it folded so the gas station attendant saw the numeral ten, the gas station attendant handed out nine dollars, the passer took it, and the car left, and by the time the gas station attendant unfolded the bill, the car was gone. That was one type of them. We had a number of instances. Another, we have received from victims play money. You have heard of United States stage money, the exact size of genuine money. Whenever we run across that we confiscate it. Play money looks like real money because it is the actual size and color of it. In the light of those circumstances, I would say yes to Mr. Auerbach's question."

168 United States Circuit Court of Appeals

[Title omitted.]

Order amending opinion

And now, to wit, this 11th day of February 1947,

It is ordered that the printed opinion filed herein on February 10, 1947, be and the same is hereby amended as follows:

By inserting at the end of the ninth line on page 9 after the word "whole," the phrase "or in part."

For the Court,

McLAUGHLIN,
United States Circuit Judge.

169 In the United States Circuit Court of Appeals for the Third Circuit

No. 9191—October Term, 1946

UNITED STATES OF AMERICA
vs.
EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER, APPELLANT

Present: GOODRICH, McLAUGHLIN, and KALODNER, Circuit Judges.

On appeal from the District Court of the United States, for the District of New Jersey.

Judgment

Filed February 11, 1947

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On Consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court,

McLAUGHLIN, *Circuit Judge.*

[File endorsement omitted.]

171 Petition for rehearing covering 11 pages filed March 3, 1947, omitted from this print.

It was denied, and nothing more by order March 21, 1947.

172 United States Circuit Court of Appeals

[Title omitted.]

Order denying rehearing

Filed March 21, 1947

Present: GOODRICH, McLAUGHLIN, and KALODNER, Circuit Judges.

The petition for rehearing in this case is denied.

By the Court,

GERALD McLAUGHLIN, *Circuit Judge.*

MARCH 21, 1947.

[File endorsement omitted.]

173 [Clerk's certificate to foregoing transcript omitted in printing.]

174 Supreme Court of the United States

No. 1389—October Term, 1946

EMIL LUSTIG, PETITIONER

vs.

THE UNITED STATES OF AMERICA

Order extending time within which to file petition for certiorari

April 19, 1947

Upon consideration of the application of the petitioner,

It is ordered that the time for filing a petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 19, 1947, provided that final judgment has been entered within thirty days preceding this date, the date of final judgment not appearing in said application.

HAROLD H. BURTON,
Associate Justice of the Supreme Court of the United States.

175 Supreme Court of the United States

No. 1389—October Term, 1946

EMIL LUSTIG, ALIAS DR. EDWARD E. FISHER, PETITIONER
vs.
THE UNITED STATES OF AMERICA

Order allowing certiorari

Filed February 16, 1948

The petition received from petitioner on July 5, 1947, as supplemented by his petition received January 28, 1948, is treated as a petition for rehearing and rehearing is granted. The order of this Court entered June 16, 1947, denying certiorari is vacated and the petition for writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1389

EMIL LUSTIG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

BRIEF ON BEHALF OF APPELLANT

EDWARD HALLE,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1389

EMIL LUSTIG,

vs. *Petitioner,*

THE UNITED STATES OF AMERICA,

Respondent

BRIEF ON BEHALF OF PETITIONER (APPELLANT)

Opinion Below

The opinion rendered by the United States Court of Appeals for the Third Circuit (102-108) * is reported in 159 F. 2d 798.

Jurisdiction

The order of the Circuit Court of Appeals affirming the judgment of conviction, was entered on February 11, 1947 (108), and Appellant's petition for rehearing was denied by the said court, by order entered March 21, 1947 (109). The petition for writ of certiorari was granted on February 16, 1948, on rehearing (110).

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* NOTE: Numerical references are to the pages of the printed transcript of record unless otherwise indicated.

Questions Presented

1. Was the appellant's conviction based on evidence illegally obtained which should have been suppressed?

2. Was sufficient evidence presented to substantiate a judgment of conviction on Counts 1, 2 and 3 of indictment 3829 C .

3. Does Count 3 of the said indictment allege an offense?

4. Was sufficient evidence presented to substantiate a judgment of conviction on Counts 1 and 2 of indictment 3875 C.

5. Did the Trial Court properly instruct the Jury on the law of the case?

6. Was it error for the Trial Court to preclude defense counsel from developing the cross examination of Government witnesses with regard to the similitude of certain evidence produced by the Government to United States currency.

7. In view of the fact that Count 3 of indictment 3829 C is inconsistent with Counts 1 and 2 of indictment 3875 C. Was it proper to sentence the Appellant to consecutive terms of imprisonment?

Statement

This matter comes before this Court on a writ of certiorari directed to United States Circuit Court of Appeals for the Third Circuit which affirmed a judgment of conviction of Appellant at a trial had before a United States District Judge for the District of New Jersey, and a Jury.

There are two indictments Cr. 3829 C-Cr. 3875 C (2-5, 10-12). Counts 1 and 2 of indictment Cr. 3829 C charge the appellant, Lustig, and one Reynolds, with counterfeiting obligations of the United States. Count 3 thereof charges

possession of certain materials with intent to use same for counterfeiting.

Indictment Cr. 3875 C charges in Counts 1 and 2 possession of obligations executed in part after the similitude of obligations of the United States.

All of the Counts in both indictments are alleged in violation of Revised Statute 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116; 18 U. S. C. A., Sec. 264.

The appellant Lustig was sentenced to serve five years on indictment Cr. 3829 C and three years on indictment Cr. 3875 C, such sentences to run consecutively.

Facts

On March 6, 1946, the appellant Lustig registered at the Walt Whitman Hotel in Camden, N. J., for himself and one Reynolds under the respective names of Dr. Edward E. Fisher and Joe Binstock, and was assigned to Room 402 (R. 33, 34).

On Sunday, March 10, 1946, at about 10:30 in the morning, Mrs. Sarah Lindsay, a chambermaid at the Walt Whitman Hotel, in Camden, N. J., went to Room 402 to make up the room (R. 51). After her lunch, at about 11:30 (R. 52), she went up to Room 404, which had a connecting door to Room 402, to strip the bed, heard a noise "like glass hitting against glass or metal hitting against metal" in Room 402, and looked through the keyhole (R. 52). She saw Lustig standing there, with a piece of green wet paper. He gave a piece of it to Reynolds (R. 52). She also saw a magnifying glass (R. 53). She went to look through the keyhole again and saw Lustig laughing. He put a little glass bottle on the desk and then laid down a little paint brush. She did not bother looking again (R. 53).

The first time she had looked through the keyhole, Lustig's back was toward her and she could not see what was in front of him (R. 58).

The second time, he was facing sideways, looking through "this microscope" (apparently the magnifying glass) at something on the desk which she could not see (R. 58), but he later picked up some stuff that "seemed to be white". It looked like this was "greenish stuff", and Mrs. Lindsay did not know what it was, but presumed it was money (R. 59). She then went to the housekeeper, Mrs. Brown, and told her what she saw (R. 59). The only time she saw the above mentioned items was when she looked through the keyhole. She saw none of these things when she cleaned Room 402 on Thursday, Friday, Saturday and Sunday (R. 59, 60).

Norwood G. Greene, U. S. Secret Service Agent went to the Walt Whitman Hotel at about 2 o'clock of that afternoon, after receiving two telephone calls, first from the office of the Camden Detective Division, and then from the Manager of the Walt Whitman Hotel, who gave his name as Mr. Shires (R. 60). Detective Arthur of the Camden City Police, who called him first, said that a man at the Walt Whitman Hotel had said that there was some violation of the Currency Laws of the United States and asked Agent Greene whether he wanted one of the managers of the hotel to call him, to which Greene answered "Yes" (R. 67). Mr. Shires then called from the hotel and said he thought there was a violation in one of the rooms of the hotel involving counterfeiting money (R. 67, 68). Greene went to Room 404 at that time and looked through the keyhole. He saw Lustig walking up and down the room, but did not see Reynolds. He saw nothing else, except three suitcases and a desk and what appeared to be a magnifying glass on top of the desk (R. 68). He was at the keyhole for about fifteen minutes and heard voices, but could not distinguish what was said (R. 68, 69). He also spoke to Mrs. Lindsay, after he looked through the keyhole, who told him

that she had seen on the table "what looked like money" and saw the Doctor (Lustig) handling it (R. 68).

Greene then went over to Detective Headquarters and saw Detective Arthur and told him that he had seen no counterfeiting going on and that he was satisfied that there was no counterfeiting going on (R. 69). It was then about 2:30 o'clock (R. 70).

Capt. Koerner, of the Camden City Detective Bureau (R. 13) *was at home* on the 10th day of March, 1946, when he received a call from City Detective Arthur at about 2:30 in the afternoon (R. 20). As a result of that telephone call, he went to his office at City Hall, arriving at 2:45 o'clock, and found Detective Arthur, Detective Fleiderer and Agent Norwood Greene of the U. S. Secret Service, in the office (R. 20, 21). Detective Arthur told him that Agent Greene wanted him and Greene then explained the case to him. He told Koerner that he had gone over to Room 404, which was next to Room 402; that he had not seen anything, but that his information led him to believe that there was something going on in Room 402 and he mentioned the names Dr. Fisher and Binstock to Capt. Koerner (R. 21). This conversation between Koerner and Greene lasted about a half hour (R. 21).

Koerner then called Sgt. Murphy, who was not on duty that Sunday, at his home, and asked him if the name Binstock came to his mind as being a racehorse man or bookie, or something like that, which Sgt. Murphy verified (R. 21). This call was made at about 3:15 o'clock (R. 21). At about 20 to 25 minutes after three, Koerner went to the Walt Whitman Hotel, checked the registration and found the names Binstock and Dr. Fisher, and then, at about 3:45, went to the home of the Clerk of the City Police and got a warrant for Binstock and Fisher for violating a Camden City ordinance in not registering as criminals after being

in the City of Camden for twenty-four hours (R. 14, 21, 22).

Koerner had no information whatever that Dr. Fisher (Lustig) was a known criminal, but stated that he knew Binstock to be a confidence man (R. 22). At about 4 o'clock, Koerner, Murphy and Detectives Fleiderer and Arthur went back to the Walt Whitman Hotel, got a key from the desk and went up to Room 402. Lustig and Reynolds were not present (R. 23). The room was in order and two brief cases and a hand bag were on the left side of the room (R. 23). They searched the room and found a tray in the bureau drawer (R. 14) and found various articles in one of the brief cases, such as trays, paper cut to the size of United States currency, some bottles, brushes, eyebrow tweezers, magnifying glass, a stick of wood three inches wide by fourteen inches long, a wooden cylinder six and a half inches long, with a piece of cloth wrapped around it, a reverse impression on paper of the face of a $100 Federal Reserve note (Ex. G-17), a reverse impression on paper of the back of a $100 Federal Reserve note (Ex. G-18), and a reverse impression on paper of the back of a $10 certificate (Ex. G-19) (R. 15-18). After the discovery of these articles, Agent Greene was called at about 5 o'clock (R. 18, 24, 25, 71). He had been waiting in the City Detective Bureau from 2:30 until 5 o'clock when he received the call (R. 72, 73). Sgt. Murphy told Greene that it looked like those people were making counterfeit money and that he better come over. When he arrived at the hotel, all of the material that had been taken out of the brief case was on the bed (R. 74). Capt. Koerner and Sgt. Murphy then put the exhibits back in the brief cases (R. 74).

At about 6 o'clock, Lustig and Reynolds returned to room 402, and were searched (R. 18, 19). Then Lustig admitted ownership of the bag (Exhibit G 15) from which the above mentioned material were taken (R. 19, 20) and the

other brief case. However, he did not admit ownership of the three impressions (R. 39). Reynolds said that the large suitcase belonged to him (R. 38). It was then ascertained that Reynolds was not Joseph Binstock and that neither Lustig nor Reynolds were Joseph Binstock (R. 38).

Lustig stated at that time that he was not there to pass counterfeit money, just to sell the idea of how to make an easy living (R. 20, 30). All of the evidence found was then turned over to Federal Agent Greene (R. 20).

Lustig and Reynolds were then taken over to the Detective Bureau at approximately 7 o'clock and remained there until 11 o'clock in the evening (R. 29, 30). During that time Lustig stated to Capt. Koerner that he was there to show somebody how to operate the machine (R. 29, 30).

Federal Agent Greene after the arrest examined what was found and was then satisfied that there was counterfeiting going on and signed a complaint on Monday, the next day. (R. 71).

Apparently, none of the money taken from Lustig or Reynolds was used in making the impressions which were put in evidence (R. 71, 72).

At the trial, Lustig took the witness stand in his own defense. He stated that Reynolds called him up to come to Camden (R. 78, 79) to perfect a device known as a money machine; that he was to show a Mr. Weber how to operate the machine (R. 80). Weber paid him for demonstrating the machine to him (R. 80). The machine is a swindle (R. 80). The press was not used to make an impression, but that it was a money box where a switch was made to fool a person into investing in the machine (R. 82, 83). He testified that he did not make any of the impressions, but that Weber made them during his absence from the room, and that impressions could be made with Exhibits G 13 and G 14, which are a flat stick and a cylindrical stick (R. 84, 85).

POINT I

The District Court erred in failing to suppress evidence obtained by illegal search and seizure and in allowing the admission of such evidence on the trial.

The appellant Lustig was found guilty on the basis of certain evidence found in his room at the Walt Whitman Hotel in Camden, New Jersey. This evidence was obtained as a result of an illegal search and seizure. The circumstances surrounding the Government's acquisition of the evidence are outlined above in the statement of facts. Briefly, Federal Agent Norwood Greene was notified that a violation of currency laws was probably occurring in room 402 of the hotel. He made an investigation by looking through the keyhole and spoke to the chambermaid who originally raised the suspicion.

At this point we must assume that he could not have made an arrest on probable cause, nor did he have sufficient knowledge to obtain a proper search warrant. If the situation were otherwise, he would have made an arrest. However, he returned to Camden Police Headquarters and arranged for Captain Koerner of the City Police to meet him. It was a Sunday afternoon and Koerner was summoned from his home. He explained the situation to Koerner during a conversation which lasted a half hour and calmly waited at Police Headquarters while Koerner proceeded to follow up the leads supplied. In order to lend color of right to the ensuing raid staged by the Camden detectives, Koerner obtained a warrant for the appellant and one Reynolds, upon the grounds that they failed to register with his Department as "known criminals." At the time he obtained this warrant, he absolutely had no knowledge that the appellant, Lustig, was a

known criminal, and, as it later turned out, actually had no knowledge that Reynolds was a known criminal. It is submitted that this supposed warrant was a mere subterfuge. No color of right was added thereby which legalized the subsequent proceeding, but merely a faint blush of confusion designed to suffuse the illegal acts of the officers and create a picture of honest investigation. As soon as the City detectives found what Federal Agent Greene was looking for, he was called over to the hotel. He had fortuitously waited at Police Headquarters from 2:30 to 5:00 P. M. on a Sunday afternoon and as soon as he received the call from the City detectives, went over to the hotel and took charge. He was in and out of the room, waiting for the appellant to come back, took charge of the evidence found in the room, and was the chief party in interest in all of the further proceedings.

The investigation began with Greene and ended with him. The intervening acts of the City Police were merely links in the chain of Greene's work. The entire course of conduct in seizing the evidence herein constituted an illegal search and seizure by a Federal Agent and rendered all of the evidence so obtained inadmissible in a Federal Criminal Proceeding. Even viewed in the most favorable light for the Government, the search was at least a joint venture of the Federal and Municipal enforcement agencies.

In the case of *Gambino* v. *U. S.*, 275 U. S. 310; 72 L. Ed. 293, at page 314, Judge Brandeis stated the rule that:

> "Evidence obtained through wrongful search and seizure by state officers who are co-operating with Federal officials must be excluded. See *Flagg* v. *United States*, 233 Fed. 481, 483, approved in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, 64 L. Ed. 319, 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182."

In the case of *Byars* v. *United States,* 273 U. S. 28, 71 L. Ed. 520, this Court stated on page 32:

> "While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is for the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' "

See also

Go-Bart Importing Co. v. *United States,* 282 U. S. 344, 356, 357; 75 L. Ed. 374, 382.

In *Crank* v. *United States,* 61 F. (2d) 981, it was held at page 983:

> "• • • where the search is made by state officers at the instigation of federal agents, or in co-operation with them, the Fourth Amendment is applicable."

The District Court stated in denying the motion to suppress in the instant case:

> "• • • But I think it has been established that there was a basis for the city authorities tc obtain their warrant of arrest, and then, in the event that there was no connection between the Federal authorities and the city authorities to the extent of an arrangement whereby the city authorities would go in and make an illegal raid, it seems to me the warrant being proper for the violation of the local law, they went in to make an apprehension under an arrest warrant, and they can make their search incident to that arrest. Even under the Federal Law, I think that would be a proper search and seizure. Even if that were not so, I do not see

> any connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law. So, I will deny your motion and allow you an exception" (R. 76).

It is respectfully urged that the District Court erred in so finding. It should have been apparent to the Court that Greene, fearful of violating the Constitutional provisions against unreasonable searches and seizures, secured the cooperation of the municipal authorities, set their forces in motion, and rejoined them in the search immediately after they had made an entry of appellant's room. As a result, Greene received all of the evidence and charged the appellant with violation of Federal Law. The net result is to the same effect as if he had conducted the whole investigation himself and had alone illegally entered and searched the room.

Detective Sergeant Murphy of the Camden Police, when asked about Greene, testified as follows on the trial below:

> "Q. You knew he was a Federal Agent? A. Oh, positively. I have known him for a number of years" (R. 42).

Thus, it is readily apparent that the federal and municipal enforcement officers were well known to each other and cooperated together. Greene stated his plight to the police and they forthwith furnished him with what he wanted.

In *Fowler* v. *United States,* 62 Fed. (2d) 656, the Court in condemning the practice between police and federal agents of having the former make seizures which are illegal to the latter, stated on page 657:

> "It would be hardly consistent with the proper regard for the protection accorded by the Fourth Amendment to permit any department of the federal govern-

ment in this manner to set the amendment at defiance. The Supreme Court has frequently and emphatically declared that the amendment should be liberally construed in favor of the individual. *Boyd* v. *United States,* 116 U. S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746; *Byars* v. *United States,* 273 U. S. 28, 32, 33, 47 S. Ct. 248, 249, 71 L. Ed. 520; *Marron* v. *United States,* 275 U. S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374; *United States* v. *Lefkowitz,* 285 U. S. 452, 464, 52 S. Ct. 420, 76 L. Ed. 877; *Sgro* v. *United States,* 53 S. Ct. 138, 77 L. Ed. . . . (December 5, 1932)."

It is submitted that in the case at bar the search and seizure made by the police was made solely for the purpose of aiding the federal authorities.

Construing the Amendment for the protection of those for whom it was designed, it is evident that the District Court erred in not suppressing the evidence found by the federal and municipal officers working in unison. Greene could find nothing. He reported to Capt. Koerner, and spoke to him for a half hour. The Captain then went in and found what Greene wanted. Capt. Koerner's search was with the sanction of federal authority but without probable cause or warrant under federal law. Since there is no evidence upon which to base a conviction when the fruits of the illegal search are suppressed, it is respectfully submitted that the conviction of appellant be reversed.

POINT II

The evidence presented by the Government to substantiate Counts 1 and 2 of indictment Cr. 3829 C alleging the execution of engravings, prints, and impressions was insufficient.

The only testimony presented to show actual execution of impressions was that of Mrs. Lindsay, the chamber-

maid. She peeked through the keyhole of the appellant's room twice and the total sum and substance of what she saw and heard is as follows:

1. A noise "like glass hitting against glass or metal hitting against metal" (R. 52).
2. Lustig standing with a piece of wet green paper, a part of which he gave to Reynolds (R. 52).
3. A magnifying glass (R. 53).
4. Lustig putting a bottle and a little paint brush on the desk (R. 53).
5. A voice saying "That is enough of them, that is enough of them" (R. 53).
6. Both men looking at something green through a glass (R. 53).

It then developed on cross-examination that the first time she looked through the keyhole, Lustig's back was towards her, and she could not see what was in front of him (R. 58). The second time she looked she saw Lustig looking at something through the magnifying glass, which she could not see, but which she *presumed* was money (R. 58, 59).

This testimony, as modified on cross-examination, failed to show that the appellant did anything in relation to printing counterfeit money. There was no evidence presented to prove actual printing.

Captain Koerner testified on cross-examination that counterfeit money could be made with the equipment found in the appellant's room (R. 30-32). However, he also stated that he had no experience making counterfeit money and that he had no experience with a chemical solution he mentioned (R. 31). Mr. Richman, the United States Attorney, affirmed that the witness was not qualified (R. 32). The witness then stated that he *was not positive* that the equipment would make counterfeit money (R. 32).

John E. Ericson, a manufacturer of printers ink, was

called as an expert witness by the Government (R. 47). He testified that he used phenol (one of the items found in appellant's room) (R. 43) for cleaning ink, that is, to dissolve it (R. 47). He further testified that with phenol ink could be transferred from one paper to another "like a decalcomania almost" (R. 47). However, on cross-examination, he stated that *he had never done it* (R. 50).

The three impressions (Exhibits G-17, G-18, G-19) were found in appellant's bag at the hotel (R. 17-19). However, he denied ever seeing them before (R. 39).

Thus the evidence adds up to just this: a chambermaid heard some suspicious noises, and saw something *wet* and green; unqualified experts attempted to describe a process for counterfeiting; and impressions were found in appellant's room. Ergo, guilty of printing counterfeit money. Simple, yes, but equally absurd.

The prints that were found *packed in appellant's brief case* but a few hours after they were supposedly seen soaking wet were *dry* (R. 40). None of the money found in the possession of appellant or Reynolds matched the prints and an investigation revealed that no money had been passed by them between the time of the alleged printing and the arrest which matched the impressions (R. 71, 72). Captain Koerner stated that he did not think it possible that men who wanted to counterfeit money would be in a public hotel (R. 43).

If these prints had been soaking wet, and had been made at the time alleged, and had been kept packed in a brief case until a few hours later, any court should take judicial notice that they could not possibly have dried out. Anyone who has travelled knows that wet clothing packed in a suitcase remains wet for a very considerable length of time when shut off from the air in such a manner. However, the second fact is even more important since neither the appellant

nor Reynolds could have made these impressions without genuine bills *and such bills were not found on them!*

Thus, it is apparent that the Trial Court should have directed a verdict for the appellant. The evidence proferred to prove the printing of the notes was purely circumstantial. The result of this evidence was a triple inference that appellant printed the impressions.

Assuming that the three impressions were admittedly found in appellant's possession within a few hours after their printing, the Government still has to prove the printing of them as alleged. This was attempted by Mrs. Lindsay's testimony. The only direct evidence is that he was manipulating a wet green paper and then looked at something through the glass. Based on this, there is an inference that this paper had just been printed by the appellant. Superimposed on the first inference is the inference that what was printed was counterfeit money and then we have imposed the third inference that the alleged counterfeits, so printed, were the three impressions found. The result is an inference, on an inference, on an inference, which clearly is proof of nothing.

United States v. *Russo,* C. C. A. 3, 123 Fed. 2d, 420, at p. 422:

"Assuming, therefore, for the purposes of this case that Russo's constructive possession of the stolen cigarettes supplied proof of the requisite possession called for by the statute, certain it is that the implied possession is incapable of supporting an inference that the constructive possessor knew that the goods had been stolen. Cf. *Sorenson* v. *United States,* 8 Cir., 168 F. 785, 798, 799. This is but the logical result of the rule respecting the efficiency of circumstantial evidence. When circumstances alone are relied upon to establish a fact, they must themselves be directly proven and not presumed. *United States* v. *Ross,* 92 U. S. 281, 284,

23 L. Ed. 707. A presumption may not be rested upon another presumption. *United States* v. *Ross, supra,* 92 U. S. at page 283, 23 L. Ed. 707; *Dahly* v. *United States,* 8 Cir., 50 F. 2d 37, 43; *Ribaste et al.* v. *United States,* 8 Cir., 44 F. 2d 21, 23; *Gerson* v. *United States* 8 Cir., 25 F. 24, 49, 60; *Brady* v. *United States,* 8 Cir., 24 F. 2d 399, 404. The rule could not be otherwise if the legally permissible effect of circumstantial evidence is to receive due respect. In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt. See *United States* v. *Baker et al.,* 2 Cir., 50 F. 2d 122, 123; *Glass* v. *United States,* 3 Cir., 231 F. 65, 68; *Hart* v. *United States,* 3 Cir., 84 F. 799, 808. • • •"

United States v. *Laffman,* C. C. A. 3, 152 Fed. (2d) 393, at p. 394:

"Direct evidence that appellant either made out or sent a false affidavit is lacking. The conviction must rest upon the circumstances surrounding the act which, if proved, would constitute the offense. The prosecution expresses agreement with the legal proposition urged by the appellant and recently reiterated by this Court that 'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.' *United States* v. *Russo,* 3 Cir., 1941, 123 F. 2d 420, 423. Accord: *United States* v. *Tatcher,* 3 Cir., 1942, 131 F. 2d 1002. • • •"

There was no evidence to show that the appellant printed these impressions. The various inferences and presumptions made on what little and vague direct evidence there was were certainly insufficient to convict the appellant. Thus, it was error not to direct a verdict for acquittal and not to set aside the verdict of guilty as against the weight of the evidence.

POINT III

The third Count of Indictment Cr. 3829 C does not state an offense.

The third Count of the mentioned indictment alleges unlawful possession of the following items with intent to suffer same to be used in counterfeiting:

1. The impression of the face of a $100 note described in Count 1.

2. The impression of the back of a $100 note described in Count 1.

3. The impression of the back of a $10 note described in Count II.

4. A wooden press.

5. Package of bond paper.

6. Four packages of bond paper (4, 5).

It is submitted that this allegation does not constitute an offense. The pertinent part of the statute under which the Court is laid (R. S. 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116; 18 U. S. C. A. 264) reads as follows:

> "* * * Whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; * * *"

shall be guilty of a crime.

The gravamen of the offense hinges on the words "plate, stone, or other thing".

Surely, there is no argument that intent to use a plate or stone made after the similitude of any plate or stone

from which an obligation of the United States has been printed, will constitute a crime. However, a serious question is developed in construing the meaning of the words "or other thing". Do the mentioned words include printing presses, inks, and papers, or do they merely include items similar to plates and stones? Apparently, the drafter of the indictment ascribed to the former view, since he included as part of the ultimate facts constituting the crime the alleged possession by the appellant of a wooden press and some quantities of bond paper, along with the three printed impressions of the notes already described above. It is respectfully alleged that this position is entirely incorrect and untenable in view of the law relating to the interpretation of general and specific words contained in statutes.

Since this is a criminal statute, it must be more strictly construed in favor of the accused, and may not be enlarged or broadened to make criminal any act not defined by its words.

In the case of *U. S.* v. *Resnick,* 299 U. S. 207, 209, 210, 81 L. Ed. 127, 129, the court stated:

> "Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to cases not covered by the words used. *United States* v. *Wiltberger,* 5 Wheat. 76, 95, 5 L. Ed. 37, 42; *Fasulo* v. *United States,* 272 U. S. 620, 628, 71 L. Ed. 443, 445, 47 S. Ct. 200."

It is the contention of the appellant that the particular words "plate, stone, or other thing" in effect mean "plate, stone, or similar thing" and do not include the various other parts of a printing press or a press itself or the papers on which such obligation may be printed.

In *People* v. *Ryan,* 274 N. Y. 149, the New York Court of Appeals held at pages 153, 154:

"Applying the doctrine of *ejusdem generis* to the expression 'No common carrier of other person' which is contained in subdivision 1(d), quoted above, the words 'No common carrier or other person' should be construed to mean 'No common carrier or other person engaged in a similar occupation,' that is, no other person engaged in commercial transportation of goods owned by or consigned to others."

In *United States* v. *Phez Co.* 28 Fed. (2d) 106, it was stated at pages 106, 107:

"To assert, however, that it is potable as a soft drink, is not to answer the question whether in the Revenue Act it was included among the beverages subjected to taxation as embraced in the words 'other soft drinks.' The act dealt with two distinct kinds of beverages: First, a fruit juice, namely, unfermented grape juice, derived by extracting by mechanical means the juice of the grape; and, second, certain named artificial soft drinks mixed, compounded, or manufactured from various ingredients, at the close of which enumeration, in order to prevent the exclusion of possible other soft drinks of the same nature and similarly manufactured, the lawmakers added the words 'and other soft drinks.'

Loju is not thus manufactured of divers ingredients; it is nothing but unfermented loganberry juice, diluted with water and sweetened, and it is not of the nature of the soft drinks which are specified. The case is one for the application of the rule of *ejusdem generis,* in accordance with which such terms as 'other,' 'other things,' 'others', or 'any other', 'when preceded by a specific enumeration, are commonly given a restricted meaning and limited to articles of the same nature as those previously described.' 25 R. C. L. 997, *United States* v. *Stever,* 222 U. S. 167, 174, 32 S. Ct. 51, 56 L. Ed. 145, *United States* v. *Nixon,* 235 U. S. 231, 35 S. Ct. 49, 59 L. Ed. 207. That sweet cider, which is sold in bottles as a beverage and is obviously a soft drink, is not included in the term 'other soft drinks,' is held

in the leading case of *Monroe Cider Vinegar & Fruit Co.* v. *Riordan* (C. C. A.) 280 F. 624, a decision which was followed in *Sterling Cider Co.* v. *Casey* (D. C.) 285 F. 885, and *Casey* v. *Sterling Cider Co.* (C. C. A.) 294 F. 426. • • •"

In the case of *In re Bush Terminal Co.*, 93 F. (2d) 659, which involved the construction of the words "oil, gas, gasoline and other combustibles", the Circuit Court for the Second Circuit held at page 660:

"• • • the fact that coal is a combustible does not make it taxable under the words 'other combustibles.' If 'combustibles' are supposed to include everything which is ordinarily intended to be burned, it would have been unnecessary for the statute to enumerate specifically the items which it does in section 1(k). The rule of *ejusdem generis* applies to such a statute. This rule is based on the theory that, if the Legislature had intended the general words to be used in their unrestricted sense, it would have made no mention of the particular classes. The words 'other' or 'any other' following an enumeration of particular classes ought to be read as 'other such like' and to include only those of like kind or character. *U. S.* v. *Stever*, 222 U. S. 167, 32 S. Ct. 51, 56 L. Ed. 145; *U. S.* v. *Chase*, 135 U. S. 255, 10 S. Ct. 756, 34 L. Ed. 117; *Lyman* v. *Commissioner*, 1 Cir., 83 F. 2d 811; *Hodgson* v. *Mountain & Gulf Oil Co.*, D. C. 297 F. 269; *People* v. *Ryan*, 274 N. Y. 149, 153, 8 N. E. 2d 313."

Thus, it is apparent that if Congress intended to include materials other than plates or stones in the very clause, it could have done so by the use of the general term "any thing" without the restricting words "plate" and "stone." However, having specifically limited the clause with the words "plate and stone" the words "or any other thing" must refer to any other thing in the nature of a plate or stone.

It would be absurd to conclude that Congress intended to make it a crime for anyone who possessed a printing press and did not possess a plate or stone made after the similitude of any plate or stone from which United States currency is printed should be convicted of a crime merely because he possesses such a printing press, even if it could be proved that he intended in the future to forge or counterfeit money.

If such were the case, any person in the United States who had any type of machine which was capable of printing would be subject to the penalties of the statute if he would make an admission to anyone that he intended to make counterfeit money. To carry the situation even further, anybody who possessed a package of bond paper and who would affirm that he intended to make counterfeit money would be guilty of violating the statute.

Such was not the intention of Congress. In using the specific words "plate" and "stone", it is apparent that Congress did not intend this clause to be extended to such ridiculous extremes, yet, in using the words "or other things" it was apparent that the intention of Congress was not to foreclose the statute merely to a plate or stone, but to include other similar apparatus which should be used in lieu of them.

As a further argument in support of this contention, it is submitted that a later clause in the statute makes it a crime to possess a paper similar to any distinctive paper adopted by the Secretary of the Treasury. It should be noted in such case, no criminal intent is necessary.

Where the Legislature passes a statute containing specific and general clauses an act prohibited by the specific may not be punished under the general.

In the case of *United States* v. *Chase*, 135 U. S. 255, 260, 34 L. Ed. 117, 119, this Court stated:

> "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' *Pretty* v. *Solly*, 26 Beav. 610, per Romilly, M. R.; *State* v. *Comr. of Railroad Taxation*, 37 N. J. L. 228. This rule applies wherever an Act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. * * *"

Therefore, the inclusion of the 500 sheets of bond paper in Count 3 of the mentioned indictment was unwarranted. If such paper was similar to a distinctive paper adopted by the Secretary of the Treasury, which was not proved at the trial, the appellant should have been prosecuted for the possession of the same under a Count for possessing distinctive type paper, not under the Count as alleged.

As regards the wooden press, it is urged that the arguments set forth above conclusively prove that possession of a wooden press with intent to counterfeit money is not a crime under the statute. Even assuming that the words "other thing" can be stretched to include this wooden press, no evidence was presented at the trial to show that such press was made after or in the similitude of any "thing" from which an obligation of the United States had been printed.

It should be noted here that the similitude mentioned in the statute would be a similitude to something used by the United States Government or one of its agencies in printing one of its obligations. This must be the true meaning, since otherwise the word "similitude" would not have been inserted.

The three remaining exhibits which are mentioned in the Count are the impressions of the face and back of a $100 note, and the back of a $10 note (Exs. G-17, G-18, G-19).

These three impressions are more particularly described in Counts 1 and 2 of the same indictment where it appears that they are described as prints in the likeness of Federal Reserve Bank Notes. They are also described in Counts 1 and 2 of Indictment Cr. 3875 C, which alleges possession of counterfeit obligations.

If they are counterfeit bank notes, it is conclusive that they are not plates, stones or other things, described by the clause of the statute under which Count 3 is laid.

There was no proof that any of these impressions could be used in conjunction with printing machinery as plates or stones or other similar things so as to produce obligations, after the manner in which obligations are produced by the United States Government or its agencies.

Some testimony was given at the trial that by taking one of these impressions and printing it on a blank piece of paper with the use of a chemical, the original of the bill would be printed again. It was further stated, however, that in doing so, some of the color would be lost. Thus, if these impressions were to be used in printing Federal Reserve notes, the product would be imperfect and the chances are, if a second print would be attempted, it would be much more imperfect.

These three pieces of paper could not possibly have been intended by Congress to have been included in the words "other thing" similar to a plate or stone in any manner made after the similitude of any plate, stone or other thing from which an obligation has been printed.

The devices which would come within the statute are such devices which are similar to plates or stones used by the United States Government in printing its obligations. Such

plates cannot be made in a short time or in the manner within which these three pieces of paper were printed. They would, of necessity, have to be made by some elaborate, painstaking and time-consuming process on material which is durable enough to withstand the printing of many impressions.

It is common knowledge that the United States Government uses every method and means at its command to render the process of counterfeiting money virtually impossible, if not impracticable. (See *Minnella* v. *U. S.*, 44 Fed. [2d] 48, 49.)

The District Court should have taken judicial notice that these three impressions were so foreign to any plate, stone or other thing in the similitude of any plate, stone or other thing used by the United States Government, in printing money, that a verdict of acquittal should have been directed for the appellant.

In *United States* v. *Woods,* 66 Fed. (2d) 262, which involved a violation of this clause of the statute, the defendants were charged with having in their possession a false plate in the similitude of a plate from which lawful $10 Federal Reserve notes are printed and that they intended to use the plate to forge and counterfeit $10 Federal Reserve notes.

In pertinent parts of the decision, relating to the making and engraving of steel plates, the Court stated at page 262:

> "Early in 1931 he began to work on one in an attic in Providence, Rhode Island. After several months he had a face plate for printing $10 Federal Reserve notes engraved but for the center part of the bill."

The Court continued at page 263:

> "The front plate was finished either late in July, 1931, or early in August of that year, * * *. Mills worked on the back plate * * * until it was finished sometime late in the following October."

It is apparent, therefore, that a plate which comes within the prohibition of the statute is difficult to make and requires considerable time for the engraving.

It is submitted that the statute was passed by Congress to prevent the printing of unlimited quantities of spurious obligations, not to prevent a single imperfect reproduction of a note by means of the simple device presented on the trial below.

It is therefore respectfully submitted that Count 3 of Indictment Cr. 3829 C does not allege an offense under the statute, and that the trial court erred in permitting the evidence presented in proof thereof to be submitted to the jury.

POINT IV

The Government failed to prove the two Counts of indictment Cr. 3875 C charging possession of an "obligation and security made and executed in part after the similitude of an obligation and security issued under the authority of the United States."

These Counts are charged under Title 18, U. S. C. A. Section 254, the pertinent language of which follows:

> "* * * or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; * * * shall be fined not more than $5,000, or imprisoned not more than 15 years, or both. (R. S. Sec. 5430; Mar. 4, 1909, c. 321, Sec. 150, 35 Stat. 1116.)"

The evidence submitted on the trial to prove the allegations in the indictment and to prove that a crime was committed in violation of the above quoted Statute, consisted

of three reverse impressions: the first, of the face of a $100 bill (Ex. G-17); the second, of the back of a $100 bill (Ex. G-18); and the third, of the back of a $10 bill (Ex. G-19). No other proof was adduced at the trial to show possession or custody of counterfeit obligations by the appellant.

It is respectfully submitted that these three reverse impressions are not obligations made or executed, in whole or in part, after the similitude of any obligation or other security issued by the United States, and that the Trial Court erred in submitting the question of the appellant's guilt on the second indictment to the jury because the evidence described was insufficient to sustain a verdict of guilty on the Counts.

The language of the Statute makes it clear that the words "in whole or in part" modify the words "made or executed." Specifically, in order for there to be a violation of this clause of the Statute, an individual must have in his possession a completely executed obligation which is after the similitude of an obligation of the United States, in whole or in part.

It should be noted at this point with particular emphasis that the language of the clause in question does not say "or any part thereof." If such words were placed at the end of the clause as they are placed at the end of the following clause relating to printing the likeness of an obligation of the U. S., the situation would be entirely different. In such a case, the printing of a likeness of the obligation constitutes the crime. The words "or any part thereof" modify the whole clause and thereby make the crime complete when any part of the obligation is printed.

In the possession and custody clause, however, as was stated above, the words "in whole or in part" modify the words "made or executed" in the sense that there must be a complete instrument, or at least one that purports to be

complete when viewed as a whole, and the crime of possession is established if merely some part or parts of that completed instrument are "after the similitude of any obligation or other security issued under the authority of the United States so as to deceive any unsuspecting person.

The words of the Statute do not make it a crime to possess an incompleted obligation, even if such part is exactly like the corresponding part of a true obligation of the United States. Indeed, the words "incompleted obligation," in the sense used, are a misnomer, since any instrument which purports to be an obligation must at least be complete to even have the label "counterfeit obligation" applied to it.

While the three impressions produced at the trial are actual reverse impressions of genuine United States obligations, that is, they would be exact prints if read through a mirror, each of them is printed only on one side of a paper larger than the actual size of United States currency. Therefore, if one were to hold one of these impressions in front of a mirror, he would see the similitude of one-half of a genuine bill. The Statute did not intend it to be a crime for an individual to possess such a paper.

The test of what constitutes the criminal act under the Custody and Possession clause of the Statute has been laid down by the courts time and again to be whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or security issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest.

U. S. v. *Weber*, 210 Fed. 973, at page 976:

> "It is sufficient if the fraudulent obligation bear such a likeness or resemblance to any of the genuine

obligations or securities issued under the authority of the United States, as is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest."

Minella et al. v. *United States, supra,* 44 F. (2d) 48, at page 49:

"Objection is made to the definition of 'similitude.' We think the charge was correct. It stated that the test was that the plate must be one 'from which it is possible to print, or which is capable of printing a $20 gold certificate in the similitude or likeness of a genuine $20 gold certificate of the United States, * * *' and that such similitude existed if 'it is calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care in his dealings with the ordinary citizen with whom he has transactions'. This is certainly sufficient under the statute if the statute is to have any practical meaning or effect. Any other construction would mean that, unless a counterfeit was perfect, it would not be in similitude. Of course, the government has taken all the steps which ingenuity and experience could suggest to make it impossible or difficult to exactly simulate its printed money. It is not to be expected that counterfeiters can do their work so perfectly as the government, nor are they required so to do to be punishable under these statutes."

It is patent that the evidence adduced at the trial falls so far short of passing this test that the Trial Judge should not have allowed its submission to the jury, and should have directed a verdict of acquittal on both counts of the second indictment. Since he did allow the jury to consider this evidence and since the jury did come in with a verdict of guilty on the Counts of the second indictment, the District Judge should have set aside such verdict as being against the weight of the evidence.

POINT V

The trial court erred in failing to instruct the jury on the law of the case.

Assuming, arguendo, that as to the three impressions in evidence (Exhibits G-17, G-18, G-19) it was a question for the jury to determine whether or not there was similitude, the Trial Court erred in not properly charging the jury as to the required test for similitude.

In a similar case, *United States* v. *Fitzgerald*, 91 Fed. 374, at pages 375, 376, the Court included in the oral charge to the jury the following instructions:

> "Now, the similitude must be in such a degree as to furnish a resemblance so near to the government obligations or securities that it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction. The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares, in dealing with a person whom he believed was acting honestly. If it could be so used against a person of that kind, when unsuspecting or unwary, as to deceive him, and be effectual to commit a fraud, then it would be in the similitude as intended by this statute. Of course, the government claims no exclusive right to each and all of the details of its printing or engraving. As to the use of the words 'United States', or the green border, or any of the words singly or by themselves, the government does not claim an exclusive right to the use; but the paper is to be considered as an entirety, and if there is such imitation on the face of the paper, when you consider the kind of paper, the size, and the color, and the general style of it, that you can say that that paper is in the similitude of a security or obligation of the United States, and so well executed as to deceive an intelligent person in a business transaction, then it is sufficiently in the simili-

tude of a government obligation to warrant you in finding that fact against the defendant in this case; otherwise not. You are to consider the paper as an entirety."

No such instructions were contained in the Court's charge below. It is submitted that where the guilt of the defendants hinges on a definition of similitude as used in the statute, the jury should be instructed as to the substance of the crime and the test applicable thereto. A study of the District Court's charge to the jury fails to disclose any instruction on similitude.

In *United States* v. *Max,* 156 Fed. (2d) 13, the Court stated the rule on page 16:

"• • • a reversal is justified if the failure to instruct constitutes a basic and highly prejudicial error. *Williams* v. *United States,* 1942, 76 U. S. App. D. C. 299, 131 F. 2d 21."

• • • • • • •

"The court and counsel of both parties were thoroughly acquainted with the law which the defendant was accused of violating, but there is nothing in the record showing that the jury was ever informed as to such prime requisites."

• • • • • • •

"The correct procedure is carefully pointed out in our recent decision in *United States* v. *Noble,* 155 F. 2d 315, where we hold that it is necessary for the Court to charge orally the substance of the crime, first in order that the defendant may hear it and except thereto if he deems it advisable and second 'to make as certain as may be that each member of the jury has actually received the instructions.'"

In the instant case, it is submitted that the jury were not properly informed of the law and consequently the appellant was basically prejudiced.

POINT VI

The trial court erred in limiting the cross-examination of certain witnesses after they had given incompetent evidence substantially affecting the rights of the accused.

Captain Koerner testified on cross-examination that the equipment found in appellant's room could make counterfeit money. The Court allowed this testimony as proper when objected to by the U. S. Attorney (R. 30, 31). Yet, the Court sustained the U. S. Attorney's objection when counsel for appellant asked the following question:

> "Q. If anybody were to present you with one of these bills, would you consider them to be United States currency?
>
> Mr. Richman: I object.
>
> Mr. Auerbach: I am asking his opinion.
>
> The Court: Objection sustained. They are not charged with passing" (R. 31, 32).

This was to show that the witness went too far in his testimony that one could make counterfeit money with the equipment found in appellant's room. Having allowed the line of testimony to go in, the District Court should have allowed it to be properly followed up or should have directed that it be stricken out. It cannot be denied that it substantially damaged the appellant's case in the eyes of the jury.

The jury was allowed to hear testimony from a police officer which the Judge allowed, and it is only natural to presume that such testimony carried great weight. If

it was incompetent when the defense attempted to break it down, then it should have been stricken out entirely or a mistrial should have been declared.

Counsel attempted to prove that the cost of the materials found in the appellant's room was insignificant as compared to the cost of the usual counterfeiting plant. The Court refused to allow such proof to be admitted (R. 46). This proof would have been material on the question of whether or not these materials did constitute a counterfeiting plant in fact, and it was error for the Trial Court to exclude the testimony.

The witness Erickson testified as to how the impressions were supposedly made. He stated on *direct* examination how he thought they could be transferred from one paper to another (R. 47). Yet, when counsel requested his opinion on cross-examination as to whether the paper in evidence was a good impression, the Court sustained the objection that it was not proper cross-examination (R. 49). This opinion was material, in view of the previous testimony of the witness who was presented as an expert before the jury. His answer to the question would certainly have influenced the jurors as to the efficacy of the impression as a counterfeit, and the testimony may well have been in appellant's favor.

Agent Greene was allowed to testify on cross-examination that these impressions would deceive an honest, sensible, unsuspecting man of ordinary care and observation "in whole or in part" and proceeded to cite an example of how a split ten dollar bill was folded so that only the numerals showed and then was passed. The Court accepted this explanation as bearing on the "similitude" stating that this was "how people can be fooled into accepting money" (R. 65). The witness then admitted that he did not believe that an ordinary, reasonable

and prudent man would be taken in by it. He also stated that no one would accept the exhibit in evidence in its present state, adding that it was incomplete (R. 65). The Court then interposed the words "in whole or in part". The witness then said that if the exhibit *were trimmed down to the actual size of a bill you would then have something different,* implying that it would then be deceptive, but that as it stood, there was too much paper (R. 66). Counsel then asked whether the printing, or numerals being in reverse would make a difference, to which the witness, Greene, replied "No" (R. 66). Counsel was then refused permission to ask whether it would reasonably be accepted in a business transaction and this line of questioning was foreclosed (R. 66, 67).

It is urged that this was error, since the Court allowed the damaging testimony in and did not allow counsel an opportunity to have the witness further qualify his testimony under the test for similitude.

Thus it is clear that in the testimony of all of these witnesses, they were allowed to testify freely as to facts which were damaging to appellant, but were not permitted to answer questions which would have had the effect of neutralizing this prejudicial damage.

In the case of *Storm* v. *United States,* 94 U. S. 76, 85, 24 L. Ed. 42, 46, the Court states:

> "* * * it is equally certain that it is error to exclude a question, proper in form, which calls for evidence material to the issue. * * *"

See also

Lindsey v. *United States,* 133 Fed. (2d) 368.

POINT VII

Count 3 of Indictment Cr. 3829 C and Counts 1 and 2 of Indictment Cr. 3875 C are inconsistent.

In Count 3 of Indictment Cr. 3829 C the Government alleges that the three impressions (G-17, G-18, G-19) were materials from which counterfeit money could be made. Counts 1 and 2 of Indictment Cr. 3875 C refers to these same impressions as counterfeit money. They could not be both, they were either one or the other, and the Trial Court erred in submitting all of these Counts to the jury and then imposing consecutive sentences thereon.

CONCLUSION

The Judgment of Conviction Should Be Reversed.

Respectfully submitted,

EDWARD HALLE,
Attorney for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1389

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER,
PETITIONER
v.
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 102–107) is reported at 159 F. 2d 798.

JURISDICTION

The judgment of the circuit court of appeals was entered February 11, 1947 (R. 108), and a petition for rehearing was denied March 21, 1947 (R. 109). On April 19, 1947, Mr. Justice Burton extended the time for filing a petition for a writ of certiorari to and including May 19, 1947 (R. 109). The petition was filed May 19, 1947, and certiorari was denied on June 16, 1947. 331 U. S.

853. On July 5, 1947, and January 28, 1948, petitioner submitted to the Court letters concerning his case, and on February 16, 1948, an order was entered treating the letters as a petition for rehearing and granting rehearing. The order of June 16, 1947, denying certiorari was vacated and the petition for a writ of certiorari was granted (R. 110).

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the search of petitioner's hotel room and the seizure of the counterfeiting paraphernalia which was found was a federal enterprise.

2. Whether the evidence is sufficient to support the verdict on counts 1 and 2 of indictment No. 3829c, relating to the making of the counterfeit impressions of Federal Reserve Bank notes.

3. Whether possession of the counterfeit impressions, a wooden press and packages of bond paper is possession of "any plate, stone, or other thing" within the meaning of Section 150 of the Criminal Code, as charged in count 3 of indictment No. 3829c.

4. Whether the counterfeit impressions are "any obligation or other security made or executed, in whole or in part, after the similitude of

any obligation or other security issued under the authority of the United States," within the meaning of Section 150 of the Criminal Code.

5. Whether, having failed to request an instruction and having failed to object to the charge that was given, petitioner may now challenge the charge on the ground that it should have more specifically defined the statutory term "similitude."

6. Whether the trial judge erroneously limited the cross-examination of government witnesses.

7. Whether count 3 of indictment No. 3829c and the charges of indictment No. 3875c are inconsistent.

STATUTE INVOLVED

Section 150 of the Criminal Code (18 U. S. C. 264) provides:

> [1] Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, shall use such plate, stone, or other thing, or any part thereof, or knowingly suffer the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; [2] or whoever by any way, art, or means shall

make or execute, or cause, or procure to be made or executed, or shall assist in making or executing any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; [3] or whoever shall sell any such plate, stone, or other thing, or bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; [4] *or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof;* [5] *or whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same;* [6] *or whoever shall*

print, photograph, or in any other manner make or execute, or cause to be printed, photographed, made, or executed, or shall aid in printing, photographing, making or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or shall sell any such engraving, photograph, print, or impression, except to the United States, or shall bring into the United States or any place subject to the jurisdiction thereof, from any foreign place, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; [7] or whoever shall have or retain in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be fined not more than $5,000, or imprisoned not more than fifteen years, or both. [Italics supplied.]

STATEMENT

Two indictments (R. 2–5, 10–12), one in three counts and the other in two counts, were filed in the District Court for the District of New Jersey charging petitioner and one Reynolds with violations of Section 150 of the Criminal Code, *supra.*

Count 1 of indictment No. 3829c (R. 2–4) charged that, without the authority of any proper officer of the United States, they made a counterfeit impression of the face, and another of the back, of a $100 Federal Reserve Bank note; count 2 (R. 4) charged the counterfeiting of the back of a $10 Federal Reserve Bank note or silver certificate of the United States; count 3 (R. 4–5) charged that they possessed these counterfeit impressions and other described materials with intent to use them or suffer their use in forging and counterfeiting obligations of the United States. Count 1 of indictment No. 3875c (R. 10–11) charged that, without the authority of any proper officer of the United States, they possessed the face and back of an obligation made in part after the similitude of an obligation issued under the authority of the United States, to wit, a $100 Federal Reserve Bank note; count 2 (R. 11–12) similarly charged possession of the back of an obligation made in part after the similitude of a $10 Federal Reserve Bank note or silver certificate. The indictments were consolidated for trial (see R. 9), and both defendants were found guilty on all counts of both indictments after a trial by jury (R. 96–98). Petitioner was sentenced generally to five years' imprisonment on indictment No. 3829c, and generally to three years' imprisonment on indictment No. 3875c, the terms to run consecutively (R. 7, 12–13). On appeal by petitioner alone to the Circuit Court of Ap-

peals for the Third Circuit, the judgment of conviction was affirmed (R. 108).

The evidence particularly bearing on the issue of the search and seizure is set forth in detail, *infra*, pp. 10–13. The evidence in support of the charges of the indictments may be summarized as follows:

In December 1945, petitioner was released after having served a sentence to imprisonment for 18 months (R. 88). Thereafter he was arrested for the offense of grand larceny and was enlarged on bail (R. 88–89). On March 6, 1946, while still enlarged on bail, petitioner and the defendant Reynolds checked into the Walt Whitman Hotel in Camden, New Jersey. Petitioner registered as Dr. Edward E. Fischer (R. 33–34) because he was trying to be "careful" (see R. 85) since "my business wasn't absolutely legal" (R. 86). He registered Reynolds as "Joe Binstock" (R. 33–34), because Reynolds had told him that "I am known here as a race horse man, a card player, and they might get me on that" (R. 85). The defendants were assigned to room 402 (R. 34).

Around noon on March 10, 1946, a chambermaid of the Walt Whitman Hotel, while working in Room 404 of the hotel, heard noises "like glass hitting against glass or metal hitting against metal" coming from the defendants' adjacent room, No. 402 (R. 52). While in Room 404, she looked into

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Room 402 through a keyhole of a door which connected the two rooms and observed petitioner holding a piece of wet paper; he "took [the paper] apart" and gave a piece to Reynolds; it was "of greenish color like money." Both men looked at the paper through a magnifying glass. She also saw petitioner place several small bottles and a small paint brush on a desk. She heard one of the men say, "That is enough of them, that is enough of them." (R. 52–53.)

At approximately 4:00 p. m. the same day, members of the Camden City detective bureau conducted a search of Room 402 in the absence of its occupants (R. 14). They found in two brief cases various articles of counterfeiting equipment, including pliers, bond paper, paper cut to the size of United States currency, a number of small bottles containing liquids, brushes, tweezers, what appeared to be castors wrapped in cloth, a piece of sponge, pieces of wet paper, a magnifying glass, a piece of plate glass, a wooden cylinder wrapped in cloth, etc. (R. 15–17). Also found in the brief cases were three impressions on paper, one of the face of a $100 Federal Reserve Bank note, another of the back of such a note and the third of the back of a $10 bill (R. 17–18). These impressions were, apparently, all in reverse (see R. 64). They had evidently been produced by partially transferring the print on genuine currency to blank paper by the use of phenol (see

R. 47–50), a quantity of which was among the items found in the hotel room (R. 43–45).

Petitioner and Reynolds were placed under arrest on their return to the hotel at approximately 6:30 p. m. (R. 19, 61). Petitioner admitted ownership of both brief cases and their contents (R. 19, 27, 33). He denied, however, that the impressions of Federal Reserve notes found in the brief case were his (R. 39). He told the officers that "they were not here to pass counterfeit money. They were here to sell the idea how to make it; make an easy living" (R. 20, 30). He admitted that the articles seized "were the items with which he was going to make counterfeit money" (R. 30).

Norwood Greene, an agent of the United States Secret Service since 1933 (R. 60) and an expert in counterfeiting matters (R. 63), testified that the three impressions were reasonable facsimiles of the bills which they were intended to imitate (R. 63), and that their likeness to United States currency was such as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation (R. 64).

Petitioner was the sole defense witness. He testified that he came to Camden to demonstrate a "money machine" to one Weber (R. 79). At petitioner's direction Weber assembled various of the implements necessary in the process (R. 79–80, 84) and pursuant to petitioner's directions Weber made the impressions which were later

found in the room (R. 85, 89). Petitioner was paid $500 and $150 for expenses for assisting Weber in this manner (R. 81). "Weber" was a pseudonym which petitioner previously had used (see R. 86–87).

The evidence bearing on the legality of the search and seizure may be summarized as follows:

When the chambermaid at the hotel became suspicious of petitioner's activities, the information was conveyed to the local police and to Secret Service Agent Greene. Greene went to the hotel at about 2 p. m. on March 10, 1946. He did not enter petitioner's room; instead he went to Room 404, the adjoining room, and looked through the same keyhole the chambermaid had used (R. 60). During the fifteen minutes in which he did this Greene observed petitioner walking about in Room 402, and also saw what appeared to be a magnifying glass on the desk, but saw no evidence of counterfeiting (R. 68–69). He talked briefly to the chambermaid, who told him that she had seen petitioner handling something that looked like money (R. 68). Greene then proceeded to detective headquarters and informed Detective Arthur, who had originally summoned him (R. 67), that he had seen no evidence of counterfeiting (R. 69, 70). At this point Greene was satisfied in his own mind that "there was no counterfeiting going on" (R. 69–70). He testified that his official interest in the matter ended then (R. 70).

Detective Arthur summoned his superior officer, Captain Koerner, and Greene told him that he "had not seen anything, but his information led him to believe there was something going on in that room" (R. 21).[1] He gave Koerner the names of the occupants of Room 402 as "Doctor Fischer and Binstock," the aliases used by the defendants in registering at the hotel (R. 21). Koerner checked with police sergeant Murphy as to whether he recognized the name of Binstock "as being a race horse man or a tout or a bookie, or something like that" and Murphy stated that he did (R. 21, 36).

Koerner went to the hotel and verified the names of the occupants of Room 402 and then returned to his office (R. 21–22). Sergeant Murphy testified that he discussed the matter with Koerner in his private office. Greene remained in an outer office and did not participate. (R. 42–43.) Koerner told Murphy of the information they had received concerning the defendants' activities, and Murphy rejected the theory that the defendants were counterfeiting currency in a public hotel. He thought it more likely that "they might be trying to counterfeit rack-track tickets." (R. 43.) Murphy suggested to Koerner that they

[1] Detective Arthur and the manager of the hotel had initially telephoned Greene and informed him that they suspected counterfeiting activities in Room 402 (R. 60, 67, 68). Apparently it was this unconfirmed information which led Greene to tell Koerner he thought there was something going on in the room.

"get into that room [Room 402] and find out what was in there" (R. 43). Accordingly, Koerner procured a warrant for the arrest of the defendants for violation of a Camden ordinance requiring all criminals staying in the city longer than twenty-four hours to register with the city authorities (R. 14, 22).[2]

To this point, Greene's sole participation in the events that occurred at police headquarters was to withdraw himself from the case and to furnish the defendants' names to the local police, and this information was verified by Koerner (R. 23). Greene did not ask the police to obtain the arrest warrant (R. 23) and he did not "discuss with Captain Koerner anything about making an entrance or going into room 402 to see whether anything would be found there" (R. 72). When at approximately 4:00 p. m. Captain Koerner, Sergeant Murphy and two detectives left police headquarters to execute the arrest warrant, Greene remained at police headquarters because "I was curious to see what they would find" (R. 72).

The four police officers proceeded to the hotel, obtained the key to Room 402 from the desk clerk and then proceeded to enter the room (R. 23). Neither defendant was in the room (R. 23). The police searched the room and uncovered the counterfeiting paraphernalia (R. 14–18, 24). After

[2] Koerner knew "Binstock" as a "confidence man," but he knew nothing about "Fischer" [petitioner] (R. 22).

the search had been completed, at about 5:00 p. m., Sergeant Murphy told Koerner that they had evidence of a federal crime and he then called Greene and told him what they had found (R. 24, 41, 74). Greene came to the hotel after the search had been completed (R. 25), and the police turned over to him that evidence which related to the federal offenses for which the defendants were convicted (R. 20, 62). The defendants returned to their hotel room at approximately 6:30 p. m., and they were immediately arrested by the local police (R. 19, 61), and they were later convicted for the local offense (see R. 28).[3] On the following day a federal complaint was issued against the defendants (R. 71).

A pre-trial motion to suppress the seized evidence was denied after a hearing (see R. 1, 76), but the transcript of the proceedings is not included in the record before this Court. At the trial, the evidence was admitted without objection (R. 75–76), but the trial judge considered on its merits a subsequent motion by petitioners' counsel to suppress the evidence (R. 76). In denying the motion, the trial judge stated (R. 76):

> * * * But I think it has been established that there was a basis for the city authorities to obtain their warrant of ar-

[3] The records of the clerk of the Camden, New Jersey, Police Court disclose that on March 12, 1946, both defendants pleaded guilty to the offense of failing to register with the city authorities, and each was sentenced to imprisonment for 30 days.

> rest, and then, in the event there was no connection between the Federal authorities and the city authorities to the extent of an arrangement whereby the city authorities would go in and make an illegal raid, it seems to me the warrant being proper for the violation of the local law, they went in to make an apprehension under an arrest warrant, and they can make their search incident to that arrest. Even under the Federal law, I think that would be a proper search and seizure. Even if that were not so, I do not see any connivance or arrangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law. * * *

The circuit court of appeals agreed with the action of the trial judge because (R. 104–105):

> From the facts we think it a reasonable conclusion that the search of appellant's room was in truth a proceeding by the state rather than an undertaking of Federal Agent Greene to obtain evidence in a manner forbidden by the federal law while at the same time avoiding the consequences by cooperation with the Camden police. There is no evidence of prearrangement or understanding between Greene and Captain Koerner in the obtaining by the latter of the city warrant and his subsequent search of appellant's room. Greene had frankly advised Koerner that he had found no evidence of counterfeiting. From then on the Camden police executive acted on his

own initiative. It is true that Greene took advantage of the results, but, as we see it, in legitimate fashion and within the bounds of the cases covering the subject. * * *

SUMMARY OF ARGUMENT

I

The search of petitioner's hotel room and the seizure of the counterfeiting paraphernalia which was uncovered was by the local police while executing a warrant of arrest and in the course of an investigation of possible violations of state law in connection with the counterfeiting of race track tickets. The search was not instigated by any official of the federal Government, and it was not made in connection with the enforcement of federal law.

The facts set forth in the Statement demonstrate that the preliminary investigation which federal secret service agent Greene made ended early in the afternoon when Greene concluded that there was no evidence of the counterfeiting of currency. Thereafter the local police came into the case. The uncontroverted evidence is to the effect that Greene did not participate in the subsequent plans or acts of the local police. He had no connection with their obtaining a warrant for the arrest of the defendants for a local offense; he did not suggest to the local police that they search petitioner's room and, indeed, he was not even present when the local police determined to enter

petitioner's room to see if he was counterfeiting race track tickets; and he did not participate in the search or seizure. The case is not like *Byars* v. *United States,* 273 U. S. 28, where a federal official participated as such in a state undertaking, nor is it like *Gambino* v. *United States,* 275 U. S. 310, where the state officials acted solely in the enforcement of federal law.

When the local police summoned Greene after they had found the paraphernalia for counterfeiting currency, the search had been completed and the materials had been seized by them. It was they who turned them over to Greene, and since they were strangers to the federal Government, petitioner's rights under the Fourth Amendment were not impaired. *Byars* v. *United States, supra,* at p. 33; *Weeks* v. *United States,* 232 U. S. 383, 398.

II

1. There is ample evidence in support of the verdict on counts 1 and 2 of indictment No. 3829c, charging petitioner with making impressions of the Federal Reserve notes. The equipment for making the impressions was found in petitioner's room. The impressions were found in petitioner's brief case among his belongings. The chambermaid observed conduct and overheard talk which suggest that the impressions were made in the morning of the day on which petitioner was arrested. And, finally, on his arrest petitioner admitted that, "We are here to make counterfeit

money but we are not here to sell it" (R. 30). When petitioner took the stand in his own defense, he admitted that the impressions were made pursuant to his instructions and denied only that his purpose was to pass counterfeit money.

2. There is no occasion to determine whether count 3 of indictment No. 3829c charges an offense, for the general sentence imposed upon petitioner is supported by either of the first two counts of the indictment.

3. There is ample evidence to support the verdict of the jury in respect of indictment No. 3875c, charging petitioner with possession of "an obligation * * * made * * * in part after the similitude of an obligation * * * issued under the authority of the United States." Petitioner's contention that none of the impressions was a complete obligation is answered by the fact that one of the impressions, Exhibit G–17 (R. 18, 76), consisting of the face of a $100 Federal Reserve note, contained the essence of an obligation, and purported to be one. It was a promise to pay, with the usual accompanying signatures. The reverse side of the impression was blank, unlike a valid note, but the back side of a note is no essential part of the obligation or promise to pay which it evidences. The document in petitioner's possession purported to be an obligation of the United States and the evidence demonstrates that it so closely resembled a genuine obligation as to deceive an unsuspecting person.

In any event petitioner has no standing to raise the point since he did not assert it in the trial court and it was not assigned in his "Grounds of Appeal."

4. Petitioner has no standing to complain that the trial judge did not specifically instruct the jury as to the meaning of "similitude." Petitioner did not request any such instruction; he did not challenge the sufficiency of the instructions in the trial court; and he did not assign the matter in his "Grounds of Appeal." In these circumstances, Rule 30, F. R. Crim. P. forecloses the contention.

5. As we show in the Argument, *infra*, pp. 43–45, in each of the instances in which petitioner complains that the trial judge improperly limited his cross-examination of certain government witnesses, there was ample basis for the action of the court either because the question was not material or because it was not properly a matter to be raised initially on cross-examination.

6. There is no inconsistency in treating the counterfeit impressions as devices for counterfeiting, as charged in count 3 of indictment 3829c, and as counterfeit obligations, as charged in the second indictment. The impressions were usable in either way. New impressions could have been made from the impressions that were seized and they also could have been distributed in the channels of commerce under the pretense that they were genuine obligations. In any event, there is

no necessity for relying on count 3 to sustain the judgment, and if this count is abandoned, there is no basis for the inconsistency contention.

ARGUMENT

I

The uncontroverted facts establish that the search and seizure was by State officers on behalf of the State and was neither instigated by the Federal official nor for the enforcement of Federal law

In a large measure petitioner's conviction was founded on evidence obtained from his hotel room as a result of the search and seizure in which the local police engaged. Petitioner's basic contention in this Court is that the search and seizure was made "solely for the purpose of aiding the federal authorities" (Br. 12) or, at the very least, that it was a "joint venture of the Federal and Municipal enforcement agencies" (Br. 9), and therefore, that the evidence should have been suppressed.[4]

There is no disagreement among the parties as

[4] Quite plainly, the search was an illegal one if tested by the Fourth Amendment, for it was not made in pursuance of a search warrant, and since it preceded the arrests, it probably cannot be said to have been made incident to the arrests. Thus, if it is determined that the search is attributable to the Federal Government, petitioner was entitled to have his motion to suppress granted. There is no occasion to inquire whether the search was good under state law, for if it was a Federal undertaking, the Federal test must be applied. If it was not a Federal undertaking, its legality under State law is immaterial. See *Byars* v. *United States*, 273 U. S. 28, 29.

to the applicable principles of law. Indeed, there could not be for the principles are plainly and firmly imbedded in our law. Thus, the Fourth Amendment protects the citizen against unreasonable searches and seizures by the Federal Government, but it is not a restraint on the enforcement agencies of the states. *Feldman* v. *United States,* 322 U. S. 487, 490; *National Safe Deposit Co.* v. *Illinois,* 232 U. S. 58, 71; *Weeks* v. *United States,* 232 U. S. 383, 398. Accordingly, where state officers or other strangers to the Federal Government improperly seize evidence, the right of the Federal Government to avail itself of that evidence is unquestioned. *Burdeau* v. *McDowell,* 256 U. S. 465, 475; *Weeks* v. *United States, supra; Byars* v. *United States,* 273 U. S. 28, 33; see *McGuire* v. *United States,* 273 U. S. 95, 99.

This principle is subject only to the limitation that the Federal Government may not do indirectly what it cannot do directly. See *Anderson* v. *United States,* 318 U. S. 350, 356. Thus, participation by a federal official acting as such in an unlawful search under the auspices of state police renders it a joint operation of the federal and state governments and the protection of the Fourth Amendment comes into play. *Byars* v. *United States,* 273 U. S. 28. Similarly, where state officers make an illegal search and seizure for the sole purpose of aiding a federal prosecution, the evidence is inadmissible in the federal courts *Gambino* v. *United States,* 275 U. S. 310.

The test in each case is whether in a realistic sense the illegal search and seizure was a federal enterprise, and in applying the test the importance of the constitutional rights involved forbids the drawing of "nice distinctions" as to when the wrongful act of the state officials was also a federal venture. See *Feldman* v. *United States,* 322 U. S. 487, 492. This Court has held that the Government may retain and use as evidence papers which were unlawfully seized by a private person (*Burdeau* v. *McDowell,* 256 U. S. 465), and similarly that where it does not appear that the local police in searching and seizing acted under any claim of federal authority, the evidence so seized is admissible in a federal trial (*Weeks* v. *United States,* 232 U. S. 383, 398).

Since we start with these accepted principles concerning which the parties are not in disagreement, the only question which remains is whether the facts support petitioner's contention that the search and seizure by the local police was really a federal enterprise. In approaching the question, it is to be noted that the evidence in question was admissible, unless petitioner satisfied his burden in the trial court of proving that the local police acted for or in cooperation with the federal agent. *Nardone* v. *United States,* 308 U. S. 338–341; *Rettich* v. *United States,* 84 F. 2d 118, 122 (C. C. A. 1). As we have shown in the Statement, *supra,* pp. 13–14, the trial judge was not persuaded by the evidence that there was "any connivance or ar-

rangement on the part of the Federal officers to have an illegal search made to get evidence they could not secure under the Federal law" (R. 76), and the circuit court of appeals agreed with this view of the facts (R. 104–105). Two courts have determined that petitioner failed to sustain his burden of proof.

In the view we take of the evidence, it is not possible to disagree with those findings unless the uncontroverted, positive testimony of the local police and the federal agent is disbelieved. The trial judge as trier of the facts obviously resolved the issue of credibility in favor of the witnesses. The circuit court of appeals, it may be assumed, accepted the trial judge's judgment on the issue of credibility. This Court is not free to do otherwise. As we shall show, the testimony in question is not inherently improbable, inconsistent or lacking the hallmark of truthfulness. This Court has none of the accepted bases for resolving questions of credibility. And it is for this reason that, "It is not for [this Court] to weigh the evidence or to determine the credibility of witnesses. The verdict of [the trier of fact] must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser* v. *United States,* 315 U. S. 60, 80. See also, *Lisenba* v. *California,* 314 U. S. 219, 238; Mr. Justice Burton dissenting, *Haley* v. *Ohio,* 332 U. S. 596, 615–625. Accepting the uncon-

troverted testimony of the local police and secret service agent Greene, the case comes to this:

Acting on information conveyed to him by a local detective (R. 67), and confirmed by the manager of the hotel (R. 67–68), secret service agent Greene undertook a preliminary investigation to determine whether the defendants were engaged in counterfeiting currency. Undoubtedly with the consent, but at least with the acquiescence of the hotel management, Greene entered room 404, the room adjoining the defendants', and, like the chambermaid, he looked through the keyhole of the connecting door in an effort to see what was happening in room 402. He saw no evidence that a federal offense was being committed, and he proceeded to the local detective bureau, the source of his original information, to apprise the local police that his official interest in the matter was at an end (R. 70). Greene testified that he told detective Arthur "that I had not seen any evidence of counterfeiting" and that at that time "From an evidential standpoint, I was satisfied there was no counterfeiting" (R. 69, 70). He furnished the local police with the names of the defendants, but did not further participate in what followed at detective headquarters.

The detectives recognized the name "Binstock," used by defendant Reynolds, as the name of a "race horse man or a tout or a bookie, or something like that" (R. 21). Sergeant Murphy, a

local policeman, rejected the theory that the defendants would counterfeit currency in a hotel room, and he theorized instead that "they might be trying to counterfeit race-track tickets" (R. 43). It was Murphy who suggested to Captain Koerner that they get into the defendants' room and find out what was in it (R. 43). Greene was not in Koerner's office and did not participate in this discussion (R. 42–43).

Evidently in pursuance of Murphy's plan, the local police obtained a local warrant of arrest for violation of a local ordinance and proceeded to defendants' hotel room. Greene did not accompany them. Without attempting to effectuate an arrest at that point, the local police entered the room with a key, searched the room for less than one hour and seized the materials which they found.

It was at this juncture that Sergeant Murphy concluded that there was evidence of a federal offense, in addition to the local crime for which the defendants were arrested, and he summoned Greene. When Greene entered the hotel room the police had the seized items set out on the bed and Captain Koerner later turned over to Greene the evidence which was used against petitioner in his federal criminal trial. When the defendants returned to their room, the local police immediately arrested them for the local offense. It was not until the next day that the initial steps to a federal prosecution were taken.

In evaluating Greene's place in the factual picture, the positive testimony of Captain Koerner is that Greene did not ask him to obtain the warrant; that Greene did not go to the hotel with him; and that "the only information received from Agent Greene was as to the names. I verified that by going to the hotel myself" (R. 23). Sergeant Murphy similarly testified that his discussion of the case with Captain Koerner—when the theory that the defendants might be counterfeiting race-track tickets and the plan for the search were developed—took place in Koerner's private office while Greene "was out in the large office talking to another man that was there"; that Greene did not participate in his conversation with Koerner; that he did not talk to Greene "about what might be found at the hotel"; that Greene did not accompany them on the search; and that Greene came to the hotel room after the search was completed in response to his telephone call (R. 41–43). In addition to his testimony that his interest in the case as a federal agent ended after his brief preliminary investigation at the hotel (*supra*, p. 10), Greene testified on cross-examination in part as follows (R. 72–73):

> Q. Mr. Greene, I suggest that * * * when you returned to the detective bureau, after your vigil at the keyhole, you discussed with Captain Koerner the possibility of making a raid or making an entrance into this room to see whether or not any-

thing might be discovered that would concern itself with counterfeiting. Is that so?

A. That is not so.

Q. You never had any discussion with him?

A. I made no suggestions.

Q. Did you have any discussion with him regarding the possibility I mentioned?

A. I mentioned the names of Doctor Edward E. Fischer and Joseph Binstock. As soon as I said Binstock that name seemed familiar, and he reached over and grabbed the telephone and called Detective Sergeant Tom Murphy.

Q. You don't know whether he had been called by any city police prior to that?

A. No; I don't.

Q. You didn't discuss with Captain Koerner anything about making an entrance or going into room 402 to see whether anything would be found there?

A. No, sir.

Q. You weren't interested officially?

A. Officially, I wasn't interested.

Q. But, nevertheless, you remained at detective headquarters from half past two to five o'clock, unofficially?

A. I was curious to see what they would find.

Q. You had no indication as to what they would find?

Mr. RICHMAN. If your Honor please, I object. That is immaterial.

The COURT. Objection overruled. Go ahead.

A. Captain Koerner thought they might be making a race track ticket.

On these facts, we think it plain that Greene did not either directly or indirectly partake in the search and seizure of which petitioner complains. Petitioner properly does not suggest that Greene directly did so. For Greene's only investigative activity was to peer through the keyhole from room 404, the room which adjoined petitioner's. It is at least a fair inference that having been summoned to the hotel by its manager, Greene was not a trespasser while he was in that room. He was there as of right. When he looked through the keyhole, Greene, of course, did not make a search in the constitutional sense. The words "search and seizure," this Court has said, could not extend "to forbid hearing or sight." *Olmstead* v. *United States,* 277 U. S. 438, 465. Looking through the keyhole was no more a search than looking through a window, as in *Agnello* v. *United States,* 269 U. S. 20, 28–30, or using a search light to observe on a boat what the darkness of night concealed (*United States* v. *Lee,* 274 U. S. 559, 563).[5] Greene's only other con-

[5] In the lower Federal courts there are cases where the police have obtained knowledge of the commission of a crime by looking through windows (*Carvalho* v. *United States*, 54 F. 2d 232 (C. C. A. 1); *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579); through a crack in a door (*Gracie* v. *United States*, 15 F. 2d 644 (C. C. A. 1)); and through a transom (*Mulrooney* v. *United States*, 46 F. 2d 995 (C. C. A. 4)).

tact with petitioner's room occurred after the local police had completed their search of the room and had taken custody of the materials which they found. Captain Koerner turned over to Greene the instrumentalities of the federal crime. Hence, it cannot be said that Greene seized anything from petitioner's room; the seizure was by the local police. If they acted on their own account, the federal Government was entitled to avail itself of evidence seized by them. *Byars* v. *United States,* 273 U. S. 28, 33.

That the local police made the search and seizure in investigating a suspected local offense and not in cooperation with federal agent Greene or solely in aid of a federal prosecution is demonstrated by contrasting the facts of this case with the facts in the *Byars* case, *supra,* and *Gambino* v. *United States,* 275 U. S. 310, the decisions which are the foundation for petitioner's contention in this Court.

In the *Byars* case a search was conducted on the basis of a state search warrant which was invalid under federal law. Four local officers and a federal officer made the search, which disclosed evidence of a federal crime. The federal officer participated in his official capacity as an enforcement officer. In these circumstances, this Court was unable to avoid "the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the

local and federal officers," and thus was a federal enterprise (273 U. S. at 33). The opinion makes plain the fact that if the federal officer had not been a party to the search or had participated "as a private person" (273 U. S. at 32) the Federal Government would have been entitled to avail itself of the fruits of the search (273 U. S. at 33). In the present case, it is undisputed that federal agent Greene did not participate in the search or seizure, nor did he instigate it or cooperate in any way with the local officers who made the search.* If he had been contacted for the first time after the search and seizure had been completed, there could be little question that it was not a federal venture. The fact that federal agent Greene conducted a preliminary investigation and then officially ended his interest in the matter even before the local police formulated their plans does not make the search any more an undertaking of the Federal Government.

In *Gambino* v. *United States, supra,* state police, not acting under federal direction, engaged in a wrongful arrest, search and seizure "solely on behalf of the United States" (275 U. S. at 316), they having assumed that it was their responsibility to cooperate in federal law enforcement (275 U. S. at 314–315). Pointing out that there "is no suggestion that the defendants were committing, at

* The testimony of Captain Koerner, Sergeant Murphy, and Greetne (see *supra*, pp. 25–27) demonstrate that Greene did not participate in or instigate the plans of the local police.

the time of the arrest, search and seizure, any state offense; or that they had done so in the past; or that the troopers believed that they had" (275 U. S. at 314), this Court held that the state officers acted "solely for the purpose of aiding in the federal prosecution" (275 U. S. at 315), and that the evidence should have been excluded. The Court carefully distinguished earlier decisions, in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecution for federal crimes, on the ground that "in none of those cases did it appear that the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws" (275 U. S. at 317). The constant point of emphasis for Mr. Justice Brandeis, in speaking for the Court, was the fact that in *Gambino's* case the search and seizure had been made solely for the purpose of aiding in the enforcement of the federal law (275 U. S. at 317–318).

No such all-persuasive factor exists in this case. Here, the local police had a local warrant of arrest for the violation of a local ordinance requiring criminals to register with the local public authorities. Petitioner and his codefendant were arrested for this offense, they pleaded guilty, and they were sentenced to imprisonment for 30 days (see *supra*, p. 13). The search and seizure was a part of this transaction. For the police went to the hotel to execute the warrant of arrest, and

while there, they engaged in the search and seizure. The search was made for the purpose of ascertaining whether, as Sergeant Murphy theorized, the defendants were engaged in counterfeiting race track tickets. Horse racing is a carefully regulated activity in New Jersey. See New Jersey Statutes Annotated, Secs. 5:5–22 to 5:5–78. And provision is made for a pari-mutuel system of wagering on such races. Sec. 5:5–62. It was the theory of the local police that the defendants might be counterfeiting the tickets used in the pari-mutuel system. This, of course, would have been a violation of state law. If the facts which the local police discovered had sustained their theory, petitioner, we believe, could have been prosecuted for violation of Section 2:132–1, New Jersey Statutes Annotated, which provides, in part:

> Any person who, with intent to prejudice, injure, damage or defraud any other person shall:
>
> a. Falsely make, alter, forge or counterfeit, or cause, counsel, hire, command or procure to be falsely made, altered, forged or counterfeited, or willingly act or assist in the false making, altering, forging or counterfeiting.
>
> * * * * *
>
> 5. Any warrant, order or request for the payment of money, o rdelivery of goods or chattels of any kind, or

6. Any acquittance or receipt, either for money or goods, or [7]

* * * * *

With counterfeit tickets petitioner would have been in a position to obtain payment on purported wagers and thus to defraud the operator of the wagering system. If, instead, the evidence had disclosed a private system of wagering on the races, petitioner could have been prosecuted by the state for possessing lottery paraphernalia, in violation of Section 2: 147–3, New Jersey Statutes Annotated. Without laboring the point, it cannot be denied that there was ample basis for local police to be investigating a possible state offense. Certainly, it cannot be said on the facts of this case, as this Court said in the *Gambino* case, that "the search and seizure was made solely for the purpose of aiding the United States in the enforcement of its laws" (275 U. S. at 317).

In sum, the record convincingly demonstrates that the activities of the local police related to local law enforcement. They did not act for the Federal Government or at the instigation of one of its officials. In these circumstances, to attribute the search and seizure to the Federal Government is unjustifiably to attribute a disregard for the Fourth Amendment to an enforcement officer who

[7] The counterfeit ticket is a "request for the payment of money" when it is presented at the conclusion of the race for payment of the wager. It likewise purports to be a receipt for money wagered.

scrupulously avoided treading on petitioner's rights and to grant a bounty to petitioner who by his criminal activities has revealed himself to be at constant war with society (see R. 86–89).

II

There is no merit in any of petitioner's remaining contentions

1. *The sufficiency of the evidence as to counts 1 and 2 of indictment No. 3829c.*—Count 1 of indictment No. 3829c charged that petitioner made, caused to be made and aided in making an impression of the face and back of a $100 Federal Reserve Bank note, and count 2 similarly charged the making of an impression of the back of a $10 Federal Reserve Bank note (R. 2–4). Petitioner urges that the evidence is insufficient to support the conviction on these counts; and that the jury should have been instructed to return a verdict of not guilty. We firmly agree with the court below that the evidence established by the Government furnished ample basis for the verdict.

As we have shown in the Statement, when the police searched petitioner's room they found the impressions in question in petitioner's brief case. Petitioner admitted that all the other contents of the brief case were his, but denied that he had ever seen the impressions. Upon his arrest petitioner stated to Captain Koerner, "We are here to make counterfeit money but we are not here to sell it. We are here to show them how to make

an easy living" (R. 30. See also, R. 38). He told Secret Service Agent Greene, "I am not making counterfeit money. I am only showing people how to make it." (R. 74, 62).

An ink expert testified that with phenol, which was among the items found in the room, an impression could be transferred from one paper to another almost "like a decalcomania" (R. 47; see also, R. 31). It was in this setting that evidence was adduced showing that in addition to the impressions in his room petitioner had in his possession the implements of counterfeiting by the transfer method: pliers, bond paper cut to the size of United States currency, small bottles containing various liquids including phenol, brushes, tweezers, sponge, pieces of wet paper, a magnifying glass, a piece of plate glass, a wooden press, etc. (R. 15–17). That these items were not curios, but rather implements for petitioner's illicit activities is shown by the testimony of the chambermaid that while in the adjoining room she heard a noise like glass hitting against glass or metal hitting against metal. She looked through the keyhole of the door and saw petitioner holding a piece of wet green paper, which he tore, giving a piece to the defendant Reynolds. She testified the paper looked like money to her. Then petitioner got out a little glass bottle—the kind that was later shown to contain phenol—and an artist's paint brush and laid them down. She then saw

a magnifying glass, which both defendants looked through. And she heard one of the men say, "That is enough of them, that is enough of them." (R. 52–53.)

Petitioner's argument makes no effort to explain away these crucial facts. Instead, he urges that the Federal Reserve notes from which the transfers were made were not found, and that if the impressions were made when the chambermaid was watching they still would have been wet when they were seized. It is true that the Government's case would have been even stronger if the money used in making the transfers had been found, but a strong case is no less so because it might have been even stronger if additional evidence had been found. There may have been sufficient time for the counterfeit impressions to have dried during the period from when the chambermaid looked in the keyhole until the undisclosed time when petitioner left his hotel room. But this factor, too, furnishes no troubling doubt. The fact is that the implements for transferring impressions were found in petitioner's room and transferred impressions were found among his possessions in his brief case. Coupled with the information disclosed by the chambermaid's testimony, it is less than difficult to conclude that the impressions which petitioner possessed were made by him or at his direction. Petitioner's admission upon his arrest (*supra*, pp. 33–34) that he was

there to make counterfeit money but not to sell it confirms what is otherwise fairly to be inferred from the evidence—that he had a direct connection with the making of the impressions. The trial judge properly denied the motion for a directed verdict (R. 77).

It is not without significance that when petitioner took the stand in his own defense, he did not deny that impressions had been transferred. Indeed, he testified that pursuant to his instructions, one Weber made the impressions (R. 84–85). Petitioner's sole defense was that the entire process had relation only to a "device [that] is strictly a swindle" (R. 80), and that the impressions were not made for counterfeiting purposes. Thus, by petitioner's own testimony, his connection with the making of the impressions is established. His purpose in making them was, of course, for the jury.

2. *The validity of count 3 of indictment No. 3829c.*—Count 3 of indictment No. 3829c charges that the defendants had in their possession, with intent to use for counterfeiting, the impressions which are the subject matter of the first two counts, a wooden press, and packages of bond paper. Petitioner urges that possession of these materials is not made an offense by Section 150 of the Criminal Code (18 U. S. C. 264), which provides in relevant part:

> * * * or whoever shall have in his control, custody, or possession any plate, stone, or other thing in any manner made

> after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof * * *.

The court below, reading "other thing" broadly, construed the clause as reaching possession of the reverse impressions which could be used to transfer to another piece of paper the impression as it originally appeared on the genuine note (R. 106). We agree with the circuit court of appeals that Section 150 should be construed consistently with the intent of Congress to strike at all devices by which counterfeit currency may be made. But there is no occasion here to contend for that construction, for the question need not be reached. Petitioner was sentenced generally to imprisonment for five years on indictment No. 3829c (R. 7). Thus, the judgment is supported by either of the other counts of the indictment. *Pinkerton* v. *United States,* 328 U. S. 640, 641–642, fn. 1; *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105.

3. *The sufficiency of the evidence to support the charges of indictment No. 3875c.*—Petitioner also contends (Br. 25–28) that the evidence is insufficient to sustain the verdict in respect of the two counts of indictment No. 3875c, each charging possession of "an obligation * * * made

* * * in part after the similitude of an obligation * * * issued under the authority of the United States" (R. 10–12). He argues that counterfeit obligations, possession of which is forbidden, must be completely executed, whereas here the evidence shows that the counterfeit obligations were incomplete, consisting only of the impressions, in reverse, of single sides of genuine obligations. He urges that the trial judge should, therefore, have directed a verdict of acquittal on both counts of this indictment, or at least that he should have set the verdict aside on the ground of its being against the weight of the evidence (Br. 28).

Petitioner did not, however, at any stage of the trial proceedings, challenge the sufficiency of the evidence as to these counts on this ground. His motion for a judgment of acquittal at the close of the Government's case was based solely on the ground that the evidence was insufficient to show possession in him (R. 77), and even this was not renewed at the end of the whole case (R. 90). Moreover, he made no motion of any kind, after verdict, in the nature of a motion for judgment of acquittal notwithstanding the verdict (R. 96–98). On the contrary, his counsel affirmatively replied, "No requests," when asked if there were any requests following rendition of the verdicts (R. 98). Indeed, the alleged insufficiency of the evidence now asserted was not even made one of

the "Grounds of Appeal" (R. 8).[8] Under well-settled principles, therefore, petitioner had no standing in the court below, nor has he standing here to question for the first time the sufficiency of the evidence in respect of whether the obligations allegedly possessed were within the purview of the pertinent language of 18 U. S. C. 264, *supra*, on which these counts were based.

But since the circuit court of appeals considered the contention on its merits (R. 106–107), we shall do so also. With the circuit court of appeals, we think it without merit. One of the three impressions on which the two counts of indictment No. ~~4875ev~~ 3875c were based was a completely executed counterfeited obligation of the United States.[9] This was Exhibit G–17 (R. 18, 76), con-

[8] Moreover, as pointed out by the court below (R. 107), the three impressions were received in evidence without objection by petitioner in respect of this phase of the matter (R. 18, 75–76), and there was no request to charge in connection with the issue now under consideration.

[9] Since petitioner's general sentence of three years' imprisonment on this indictment (R. 12–13) was less than the 15-year maximum imposable under either of its counts, it is sufficient, in order to sustain the judgment of conviction under this indictment, to show that any one of the three impressions in question was a counterfeited obligation of the United States of the type proscribed. *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, note 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105. However, we think the statute is capable of being construed to include even the counterfeit back of a Federal Reserve note which is in part in similitude of a valid note and which is intended to be passed as a genuine obligation. Cf. *United States* v. *Raynor*, 302 U. S. 540, 546–552.

sisting of the impression of the face of a $100 Federal Reserve note (see R. 11). It contained the essence of the Government's obligation ("The United States of America will pay to the bearer on demand One Hundred Dollars," coupled with the counterfeited signatures of the Treasurer of the United States and the Secretary of the Treasury), as well as as the other customary notations and figures which appear on the face of such a note (the series number, series year, portrait of Franklin, etc.). It is true that the reverse side of the paper bearing this impression was blank,[10] but, for purposes of this statute, the matter appearing on the reverse side of United States currency is clearly not an essential part of the obligation or promise to pay which it evidences (see R. 11). While, therefore, the simulated obligation of the United States represented by Exhibit G–17 was incomplete in the sense that its reverse side was blank, it was complete in all the essential features of such an instrument, *viz,* the promise to pay and the purported signatures o fauthorized officials of the Government. Cf. *United States* v. *Sprague,* 48 Fed. 828 (E. D. Wis.).[11]

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[10] A different exhibit (G–18, R. 18, 76), also found in petitioner's possession, bore the counterfeited impression of the reverse side of the bank note of which Exhibit G–17 was the counterfeit impression of the face.

[11] The courts have been very liberal in construing the term "obligation * * * made * * * after the similitude of any obligation * * * issued under the authority of

It is also true that the writing and figures on Exhibit G–17 were in reverse,[12] but that fact, we think, is immaterial. For, as the court below pointed out (R. 106–107), and as petitioner concedes (Br. 27–28), the well-settled criterion of whether a counterfeit obligation is "made * * * after the similitude of" a genuine United States obligation, within the meaning of the pertinent statutory language, is "whether the fraudulent obligation bears such a likeness or resemblance to any of the genuine obligations or securities issued under the authority of the United States as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when

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the United States," as used in the clause of the statute making possession of such an obligation a crime. The following types of instruments, it has been held, may properly be found by the jury to come within the proscribing language, provided, of course, the instrument in question sufficiently resembles in general appearance a genuine obligation of the United States as to deceive the unwary: an obligation of the "United States Silver Mining Company of Denver, Colorado," if bearing the purported signatures of the company's president and secretary (*United States* v. *Sprague*, 48 Fed. 828 (E. D. Wis.)); a stock certificate of the "Denver Mining Company" (*United States* v. *Fitzgerald*, 91 Fed. 374 (D. Wash.)); a genuine note of a duly chartered state bank whose currency had become worthless due to insolvency (*United States* v. *Stevens*, 52 Fed. 120 (W. D. Va.); an instrument consisting of two notes pasted back to back, one purporting to have been issued by the "Bank of the Empire State," and the other by the "Bank of Howardsville" (*United States* v. *Weber*, 210 Fed. 973 (W. D. Wash.)).

[12] That is, the writing and figures on the impression would read correctly only if its mirrored image were looked at.

dealing with a person supposed to be upright and honest." *Minella* v. *United States,* 44 F. 2d 48, 49 (C. C. A. 8); *United States* v. *Weber,* 210 Fed. 973 (W. D. Wash.); *United States* v. *Fitzgerald,* 91 Fed. 374 (D. Wash.); *United States* v. *Kuhl,* 85 Fed. 624, 632 (S. D. Iowa); *United States* v. *Sprague,* 48 Fed. 828, 829 (E. D. Wis.). And, according to the testimony of Greene (R. 63–66), an expert in counterfeiting matters (R. 60, 63), Exhibit G–17 met this test.[13]

4. *The instructions to the jury.*—Petitioner further contends (Br. 29–31) that the trial court erred in failing to instruct the jury in regard to the applicable law on the issue of whether the counterfeit impressions in evidence bore a sufficient resemblance to the genuine obligations they

[13] It is true that Greene qualified his affirmative answer to the question of whether Exhibit G–17 met this test by remarking that, before it could fool anybody, it would have to be trimmed down to the actual size of a genuine $100 bill by cutting off a border that was on it at the time it was found in petitioner's possession (R. 65–66). But since this trimming process would have taken but a moment, the presence of the border when the impression was found in petitioner's possession was insufficient in itself, we think, to prevent the impression from coming within the purview of the statute. In this connection it must be noted that the cases establishing the test of similitude above referred to were not concerned with counterfeit impressions having a border which made the entire instrument larger than the obligation it simulated. They were concerned with the degree of similarity between the lettering and general style of the counterfeit impression itself and that of the genuine obligation it imitated.

simulated as to make his counterfeiting and possessing them criminal. He requested no such instruction, however (see R. 90), nor did he take exception to the sufficiency of the instructions (see R. 96), nor, in fact, did he assign the now-alleged deficiency in the instructions in his "Grounds of Appeal" (R. 8). Clearly, therefore, he had no standing in the court below, nor has he standing in this Court, to challenge the adequacy of the instructions. See Rule 30, F. R. Crim. P.[14]

5. *The rulings on evidence.*—Petitioner further contends (Br. 31–33) that his counsel's cross-examination of certain government witnesses, in four enumerated instances, was unduly curtailed. It is well settled, however, that a trial judge has a wide latitude of discretion in permitting and limiting cross-examination, and there clearly was no abuse of discretion here.

(a) The trial judge's refusal to permit counsel to ask Koerner, the captain of the Camden detective bureau (R. 13), whether he would be deceived by the counterfeit impressions in evidence if an

[14] We would point out, however, that the question of whether the impressions in evidence were such likenesses of the obligations they simulated as to be calculated to deceive unsuspecting persons of average observation and care when dealing with supposedly honest persons—the test of similitude which has been laid down by the courts (see pp. 41–42, *supra*)—was thoroughly gone into at the trial (see R. 63–67), so that the jury were amply apprised of the nature of the test.

attempt had been made to pass them on him (R. 32) was proper, because, as the judge observed, the sufficiency of the resemblance between the counterfeit impressions and the genuine obligations they simulated was for the jury to decide, and whether Koerner would have been deceived was beside the point. As we have shown, *supra*, pp. 41–42, the test for the jury was not whether a professional police officer would have been deceived; it was whether the ordinary unsuspecting person would accept the counterfeit as genuine money.

(b) The refusal to permit counsel to question Clapp, the chemist (R. 43), concerning the cost of the various counterfeiting materials found in petioner's hotel room (R. 46) was also proper, since, as observed by the judge, it was entirely immaterial how much they cost.

(c) The refusal to permit counsel to question Erickson, the ink manufacturer (R. 47), as to whether one of the counterfeit impressions in evidence was a "good" impression (R. 49) was proper, because, as pointed out by the prosecutor in objecting, the question was clearly beyond the scope of the direct examination. If petitioner desired to obtain testimony from the witness to show that the counterfeit obligation was not similar to a genuine one, he should have placed the witness on the stand as a defense witness.

(d) Finally, the refusal to permit counsel to

pursue a line of inquiry, in his cross-examination of Greene, the Secret Service agent (R. 60), concerning whether or not an ordinary person, acting with ordinary care in a business transaction, would be deceived by the counterfeit impressions in evidence (R. 66–67) was based solely on the ground that the matter had already been fully covered in the cross-examination, as it had been (see R. 63–66). Plainly, therefore, the trial judge appropriately exercised his discretion in terminating this particular line of inquiry.

6. *The alleged inconsistency between count 3 of indictment No. 3829c and indictment No. 3875c.*— Petitioner's final argument is that the impressions were regarded in count 3 as being devices from which counterfeit obligations could be made and in the second indictment they were treated as being themselves the counterfeit obligations. It is urged, therefore, that the charges are inconsistent. But the short answer to the argument is that the impressions did have this dual character. By following the same process by which they were made, new impressions could be made from the counterfeit ones. And the counterfeit impressions were useable, too, for distribution in the channels of commerce. Any possible harshness in relying on the same act to establish two offenses (cf. *Gavieres* v. *United States,* 220 U. S. 338) is obviated here by the fact that there is no need to rely on count 3 to sustain the judgment (see *supra,* pp. 36–37).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 1389

EMIL LUSTIG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITIONER'S BRIEF ON REARGUMENT CONCERNING LEGALITY OF SEARCH AND SEIZURE

This is a reargument of an appeal which was originally heard by this honorable court on April 19, 1948. The statement of the case and of all of the facts relevant to this reargument are included in the brief on behalf of petitioner which was submitted in conjunction with the original argument, as aforesaid. In order to avoid needless repetition, facts or other matter which appeared in the original brief will not be reprinted herein, except as necessary for the purpose of presenting logically and with clarity the arguments herein.

Order of This Court Following Original Argument

The court, on June 21, 1948, entered the following order in this case:

> "This case is ordered restored to the docket and assigned for reargument. Counsel are requested to

discuss in their briefs and on oral argument the relevance of the legality of the search and seizure. (See Wolf *v.* People of the State of Colorado, Nos. 593-594, October Term, 1947). This case is transferred to the summary docket and assigned for hearing immediately following those cases."

Facts Concerning Original Argument

It was argued most strenuously on the original argument herein that under applicable decisions of this court the search and seizure herein was unreasonable, having been illegally made by state officers at the instance of, and in cooperation with, an officer of the federal government and, therefore, inimical to the provisions of the 4th Amendment to the Constitution of the United States. The government conceded that the search by the Camden police was illegal but argued non-cooperation with federal authority. On the instant reargument, petitioner renews all of the arguments presented concerning cooperation between state and federal officers with as much force and vigor as in his original presentation. However, in view of the request contained in the order of this court herein, and in view of the intense interest recently centered on the problems of search and seizure, especially the relation to searches made by state officials and their validity as affected by the 4th and 14th Amendments to the Constitution, the following further arguments are presented:

POINT I

This Honorable Court Should Correct Its Decision in Weeks v. United States, 232 U. S. 383, Wherein It States That the 4th Amendment Is Not Directed Against the Acts of State Officials.

It is submitted that a portion of the decision in *Weeks* v. *United States, supra,* should be corrected by this honorable court in the following particulars:

It will be remembered that in the mentioned case Weeks was arrested on charges of using the mails for the purpose of transporting lottery tickets in violation of the Criminal Code. He was arrested by a police officer without warrant at a railroad station in Kansas City, Missouri. Other police officers had gone to his house and, after entry and search, had taken possession of various papers and articles found therein which were turned over to a United States marshal. Later in the same day police officers together with the United States marshal, who thought he might find additional evidence, entered and searched the petitioner's room and carried away letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officers had a search warrant.

In its opinion this court came to different conclusions concerning the two seizures; *i.e.*, the first made by the police officers acting alone, and the second made by the marshal accompanied by the police officers. The major portion of the opinion concerned the latter seizure and condemned the action of a United States official in making such an illegal search and seizure. Mr. Justice Day who delivered the opinion of the court stated (at p. 393):

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

Thus, the effect of the main portion of the decision of *Weeks* v. *United States, supra,* was (1) the 4th Amendment condemns unreasonable searches and seizures, and (2) the protection afforded thereby is a nullity unless the fruits of such search and seizure are suppressed and rendered inadmissible in a federal trial.

If we condemn the officer, whether federal, state or municipal, who is guilty of an unreasonable search, and at the same time permit the evidence to be used against a person who seeks protection of the amendment in a *federal court*, we find that the amendment affords no protection at all. Thus, this court, in its decision, stated that the amendment was not only directed against the illegal acts of the officer but also to the suppression of the evidence which the illegal search revealed.

If this 4th Amendment be limited as inhibiting merely the federal government, as other decisions of this court have held (*Barron* v. *Baltimore*, 7 Pet(US) 243; *Feldman* v. *United States*, 322 U.S. 487, 490), then it should follow that in order for persons to be secure in their homes, papers and effects as against invasions by the federal government, any evidence obtained by illegal search and seizure should be suppressed in a federal trial. *Weeks* v. *United States, supra*, condemns the use of the fruits of the unwarranted invasion more than the unwarranted invasion itself. An unwarranted invasion, while it might disturb the privacy of the citizen momentarily, although grave, does not have the irreparable effect of a criminal conviction based on the fruits of such unwarranted invasion. Therefore, it is submitted that the following part of the court's opinion in *Weeks* v. *United States, supra*, was in effect in contradiction to the major portion of the said opinion and should be corrected by this court. We quote from page 398:

> "As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. *What remedies the defendant may have against them we need not inquire,*

as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies. Boyd case, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and see Twining *v.* New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14." (Italics ours).

Thus, in a few sentences in the opinion, the court deviated from the rule of the case to exclude from the operation of the amendment the right of suppression in federal courts of tainted evidence which was originally secured by state officers. It is this deviation which petitioner contends most respectfully should never have been made. It emasculates the constitutional safeguards granted by the 4th Amendment. It allows the federal government to make use of illegally obtained evidence against its citizens and others, even though the plain mandate of the constitution is that the federal government shall not unreasonably interfere with the privacy of persons within its jurisdiction.

If the 4th Amendment is, therefore, of any effect at all, it can be effective to protect civil liberties only by the suppression of wrongfully obtained evidence; and if it is directed only against the federal government then all wrongfully obtained evidence should be suppressed in federal courts whether obtained by federal officers, state officers or private citizens. Unless the 4th Amendment is construed in the light of these arguments, the very principle upon which it is founded, that of freedom from unwarranted interference with private rights, will remain merely a principle to which the United States pays lip service and enforces only when the offending evidence is obtained directly by its own officers and employees.

Petitioner submits at this time that any use by the federal government of wrongfully seized evidence *ratifies* the original seizure as being made on behalf of, by, and for the government; and thereby violates the 4th Amendment.

In *Burdeau* v. *McDowell*, 256 U. S. 465, this court again stated that the 4th Amendment gave protection against unlawful searches and seizures only as against original governmental action, and the court held in that case that papers seized illegally by a private citizen which were turned over to federal authority at a later date should be admissible as evidence in a federal criminal trial. Again, in this case, which followed that portion of the *Weeks* case sought to be corrected herein, it would seem that the principle underlying the 4th Amendment was lost sight of.

A man was convicted because of an unreasonable search, and seizure of his private papers which were subsequently used as evidence against him in a federal criminal trial and the conviction was affirmed by this court. The rationale of the opinion was that the papers came into the government's possession without a violation of petitioner's rights by governmental authority. The fact that they were wrongfully taken by persons not connected with the government did not prevent them from being held for use in a criminal prosecution.

Mr. Justice Brandeis wrote a dissenting opinion in the case (pp. 476, 477), in which Mr. Justice Holmes concurred. In the dissenting opinion both justices were of the opinion that this court should not permit a law officer of the United States to retain evidence for use against an individual in a criminal case knowing such evidence to have been obtained by wrongful means.

If the fruits of wrongful invasion of private rights, either by federal or state officials, or private individuals, be subsequently used as evidence in a federal court, then the United States Government acquiesces in and accepts the original wrongful seizure and elects to treat such seizure as having been made originally on governmental behalf. The resulting ratification is clearly a violation of the provisions

of the 4th Amendment and should be heralded as such in a decisive opinion of this court.

It is most respectfully submitted that this honorable court correct the decision in *Weeks* v. *United States,* supra, by stating that although the 4th Amendment may not be directed as against state officers, it is nevertheless directed to federal officials to the extent that they may not use wrongfully obtained evidence in federal courts whether or not such evidence was obtained by federal or state officers or private individuals.

Point II

Under the Decision of Weeks v. United States, Supra, the Entry of Federal Agent Greene Into the Room of the Petitioner Before His Return and Arrest Was in Itself an Unreasonable Search and Seizure Which Violated the 4th Amendment.

As was pointed out to this honorable court at the beginning of Point I herein, the evidence wrongfully taken by the United States marshal in the *Weeks* case, *supra,* was held to be excluded. The pertinent facts were that after Weeks had been arrested by the local police and after the police had searched his room, the United States marshal went to the room with police officers and obtained some papers. It was this action of the marshal that this court held to be an unreasonable search and seizure.

In the instant case the action of federal agent Greene was even more arbitrary. Assuming, *arguendo,* that the original acts of Greene, in conjunction with the Camden police, did not constitute cooperation as a matter of law, and assuming that Greene's first interest in the case occurred upon his entering into the petitioner's room after the city police had made their illegal search, this entry alone was sufficient to constitute an unreasonable search and seizure

by an officer of the federal government. Greene had less cause to enter the premises of the petitioner in this case than the United States marshal had in the *Weeks* case. In the *Weeks* case the man had been arrested and evidence had already been obtained which pointed to his guilt. In this case no one had yet been arrested and the evidence which was uncovered by the city police was of dubious character. The city police themselves did not know whether such evidence was evidence of a federal crime.

Greene himself testified that at the time he received a call from the Camden police to come over, Sergeant Murphy told him that these people looked like they were making counterfeit money and he better come over. Greene's testimony implied that the city police were not certain at the time of the call that the equipment was evidence of counterfeiting (Rec. p. 74). It is undisputed that later on, after the petitioner returned and was arrested, agent Greene took all of the evidence away with him (Rec. p. 20). Thus, the federal agent arrived at the petitioner's room in his absence, made a search of what was in the room and retained such articles as he thought were relevant to a federal criminal prosecution for counterfeiting. It is submitted that this in itself was an unreasonable search and seizure by an officer of the federal government which renders the evidence seized inadmissible.

It was stated in *Weeks* v. *United States, supra,* at pages 393-394:

> "The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct viola-

tion of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused."

Point III

In Any Event, the 14th Amendment to the Constitution Has Reenacted the 4th Amendment So as to Apply Specifically to State Officials.

The 14th Amendment of the Constitution, in pertinent part, reads as follows:

> "* * * nor shall any State deprive *any person* of life, liberty, or property, without due process of law; * * *" (Italics ours).

Petitioner relies on the quoted clause of the 14th Amendment. Through this clause provisions of the original Bill of Rights, in which the 4th Amendment is included, apply to state action and state prosecutions. It is submitted that the provisions of the 4th Amendment along with the other amendments of the Bill of Rights constitute a basic conception of what is due process of law. If a state allows evidence to be admitted in criminal prosecution which was wrongfully obtained by a state officer, the defendant in such action would not receive due process of law under the 14th Amendment (*Adamson* v. *California*, 332 U. S. 46, see dissenting opinion of Mr. Justice Black, pp. 68-92, and dissenting opinion of Mr. Justice Murphy, pp. 123-125; *Bute* v. *Illinois*, Vol. 92, No. 14, L. ed. advance opinions, p. 735, see dissenting opinion of Mr. Justice Douglas, pp. 754-756; see also *re Oliver*, Vol. 92, No. 11, L. ed. advance opinions, p. 491).

Thus, if this were a prosecution by the State of New Jersey, the evidence obtained by the Camden city police as result of their search without search warrant of the peti-

tioner's room in his absence should have been suppressed. If the 14th Amendment serves and is directed against the action of states and the 4th Amendment is directed against the action of the federal government, then any evidence wrongfully obtained by either a state or a federal officer may not constitutionally be used in either a state or federal proceeding, or *vice versa*.

POINT IV

The Activities of Agent Green and the Detectives of the Camden City Police showed Cooperation Between State and Federal Officials as Matter of Law.

This point was argued at the original hearing before this Court and, therefore, petitioner will not at this time set forth argument at length. However, we desire to point out that the federal agent waited in police headquarters on a Sunday afternoon from approximately 2:30 to 5:00 P. M. with full knowledge that the city police were going to make a raid (Rec. pp. 70, 72). He (Greene) was curious to see what they would find, but stated that at that time he was no longer officially interested (Rec. p. 72). Yet, when he received the telephone call to come over at 5 o'clock, he went to the Walt Whitman Hotel in an official capacity. He took the results of his illegal search away from the hotel in an official capacity. On the following day when he swore out a complaint against the petitioner for counterfeiting, he did so in an official capacity. It is petitioner's contention that under the facts and circumstances in this case the trial judge should have found as matter of law that there was active cooperation between the state and federal authorities.

Conclusion

I

This Court should correct that portion of the decision in *Weeks* v. *United States, supra,* which holds that the 4th

Amendment is not directed against state officials. The 4th Amendment is directed against the use of the fruits of any unreasonable search and seizure by the federal government. This is the rationale of the *Weeks* case and should be clarified, as indicated herein, above, by correcting the small portion of that decision which is inconsistent therewith.

II

In any event the *Weeks* case shows that where a federal officer enters on premises without a warrant at the instance of, or even with state police, and himself obtains evidence, such evidence is inadmissible since such an entry and seizure is an unreasonable search and seizure.

III

And, finally, the 14th Amendment condemns illegal searches and seizures for the states themselves and in conjunction with the 4th Amendment renders inadmissible any evidence obtained by illegal search and seizure, whether by state or federal officer.

IV

The judgment of conviction and affirmance by the Circuit Court of Appeals herein should be reversed by this honorable court.

Respectfully submitted,

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1 Greenleaf, *Evidence* (16th ed.), § 254a, p. 394 — 20

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 1389
OCT. T. 1946

EMIL LUSTIG, ALIAS DR. EDWARD E. FISCHER,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

STATEMENT

This case was briefed and argued last term. The primary question considered at that time was the essentially factual issue whether the search and seizure, whereby the evidence was secured, was an exclusively state enterprise, or whether Mr. Greene, a United States Secret Service agent, had participated therein in such a manner or to such an extent as to make it in whole or in part a federal enterprise. Petitioner

conceded in effect that if the federal agent had not so participated, the evidence obtained by the state officers was admissible in the federal prosecution (Br. 8–12). On the other hand, the Government conceded that the search and seizure was illegal if judged by the standards of the Fourth Amendment (Brief for the United States, p. 19, fn 4) and, therefore that if it should be held that the federal agent actively participated therein (*Byars* v. *United States,* 273 U. S. 28), or if it was conducted solely for the benefit of federal prosecution (*Gambino* v. *United States,* 275 U. S. 310), the evidence secured thereby should have been excluded.

On June 21, 1948, this Court entered the following order:

> This case is ordered restored to the docket and assigned for reargument. Counsel are requested to discuss in their briefs and on oral argument the relevance of the legality of the search and seizure. (See *Wolf* v. *People of the State of Colorado,* Nos. 593–594, October Term, 1947.) This case is transferred to the summary docket and assigned for hearing immediately following those cases.

In the *Wolf* cases, evidence seized by state officers was admitted in evidence in a state criminal prosecution. The petitioners in those cases contend (1) that the search and seizure was illegal and (2) that the Fourteenth Amendment requires

the exclusion of the evidence obtained thereby. The state argues (1) that the search and seizure was lawful and (2) that even if it was not, the evidence is nevertheless admissible.

We assume that the Court is satisfied in the case at bar that the search and seizure was entirely a non-federal enterprise, because the evidence was concededly inadmissible if the search and seizure should be held to have been a federal or a joint federal-state enterprise. It is our position that the legality of the search and seizure is immaterial to the question of the admissibility of the evidence. Our research has failed to disclose any cases or state statutory or constitutional provisions which definitively determine the legality of the search and seizure under the law of New Jersey, where the acts took place.[1] And since, in our view, the legality of the search and seizure

[1] The New Jersey Constitution, Article I, par. 6, reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

It should be noted that New Jersey has consistently followed the rule that relevant, competent evidence is not rendered inadmissible by the fact that it was obtained through an illegal search and seizure. *State* v. *Lyons*, 99 N. J. L. 301, 303, 122 Atl. 758; *State* v. *Black*, 5 N. J. Misc. 48, 135 Atl. 685 (considering and rejecting the federal exclusion rule); *State* v. *Gillete*, 103 N. J. L. 523, 524, 138 Atl. 381.

under state law is irrelevant in this case, it will not be necessary to conjecture how the highest court of New Jersey would dispose of that issue. For the same reason, it is unnecessary to determine whether state or federal law would govern the legality of the search and seizure.[2]

SUMMARY OF ARGUMENT

I

Commencing with *Boyd* v. *United States,* 116 U. S. 616, and consistently since *Weeks* v. *United States,* 232 U. S. 383, the federal courts have

[2] It is our opinion, however, that if the legality of the search and seizure were relevant, it should be determined by state law since it was a state enterprise, and it would be most anomolous to hold evidence secured by state officers, in full compliance with their prescribed functions and obligations, inadmissible in a federal court merely because the federal Government might impose somewhat different details of obligations upon its officers in the execution of their duties. Cf. *United States* v. *Di Re,* 332 U. S. 581, 589, where a state officer made an arrest without warrant for a federal offense. The Court said: "We believe, however, that in absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity." We can see no reason why the rule should be any different in a case involving a search and seizure by a state officer, particularly where, as in the instant case, the entry was made for arrest under a local ordinance. There appears to be no applicable federal statute. 18 U. S. C. 492 (based on 18 U. S. C., 1940 ed., § 286), covering forfeiture of counterfeit paraphernalia, prescribes no rules governing the method of search and seizure. 18 U. S. C. 2236 (based on 18 U. S. C., 1940 ed., § 53a), making illegal search and seizure a criminal offense, applies only to "an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States."

held inadmissible in federal criminal proceedings evidence obtained by federal officers through searches and seizures in violation of the Fourth Amendment. Simultaneously, beginning with *Weeks* v. *United States, supra,* this Court has held admissible in federal criminal proceedings evidence obtained through illegal searches and seizures by state officers, without participation by federal officers. Both of these rules have been followed in innumerable cases in the lower federal courts. The problem has always been treated as involving only the Fourth Amendment, and as not involving the prohibition of the Fifth Amendment against compulsory self-incrimination.

II

There is no reason in policy or law to reverse the long-standing rule of *Weeks* v. *United States,* admitting in federal criminal proceedings evidence obtained through illegal searches and seizures by state officers.

A. The purpose of the general federal rule of excluding evidence obtained through illegal searches and seizures by federal officers is to implement the Fourth Amendment effectively by denying to the federal government any benefit from the illegal acts of its officers. Under this rule, therefore, effective pressure is placed upon federal officers to obtain evidence by methods which do not violate the Fourth Amendment.

Where the illegal search and seizure is by state officers, who are not subject to training and control by the federal government, the exclusion from federal criminal proceedings of evidence thus obtained, accomplishes no beneficial result. Violations of federal law will go unpunished, although the federal government cannot control local police procedures.

B. The continued application of the long-established *Weeks* rule violates no constitutional right of the petitioner. Where, as here, the search and seizure were made by state officers, the Fourth Amendment is not applicable. The privileges and immunities clause of the Fourteenth Amendment does not assimilate rights protected against federal encroachment by the Fourth Amendment; that clause protects against state action only those privileges and immunities inherent in *national* citizenship in a federal system.

The admission in federal criminal proceedings of evidence illegally seized by state or local officers does not deprive petitioner of liberty or property without due process of law within the meaning of the Fifth or Fourteenth Amendments. Due process embraces those standards of procedure which are "the very essence of a scheme of ordered liberty." The fact that the majority of the states, together with England and Canada, admit relevant evidence regardless of the illegal-

ity of the means by which it was obtained, demonstrates that the exclusion of evidence obtained by a wrongful search and seizure is not one of the elements of due process of law. In fact, this Court has never held that the immunity from unreasonable searches and seizures itself is one of the fundamental rights embraced by the concept of due process. *A fortiori,* due process does not require enforcement of the immunity by the indirect sanction of exclusion of evidence.

ARGUMENT

I

EVEN IF THE EVIDENCE WAS ILLEGALLY OBTAINED BY STATE OFFICERS, ITS ADMISSION IN FEDERAL CRIMINAL PROCEEDINGS HAS LONG BEEN PERMITTED UNDER DECISIONS OF THIS COURT

A. At common law, and originally in the federal courts, the admissibility of evidence was not affected by the manner in which it was obtained

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment is silent as to the admissibility in legal proceedings of evidence obtained in violation of its prohibition. At common law, the legality of the means by which evidence was obtained was irrelevant to its admissibility and, as we shall later point out, this is still the rule in many states and in England and Canada. The admissibility rule was originally followed in the federal courts, although apparently not considered by this Court. Thus, in *United States* v. *La Jeune* (1822), 2 Mason 409, 26 Fed. Cas. 832, 843–844, No. 15,551 (C. C. D. Mass.), Justice Story, sitting on circuit, rejected a contention that where there was no right to search the evidence discovered by such search could not be used, stating that "In the ordinary administration of municipal law the right of using evidence does not depend, nor as far as I have any recollection, has ever been supposed to depend upon the lawfulness or unlawfulness of the mode, by which it is obtained." Thirty-eight years later, in *Stockwell* v. *United States,* 3 Cliff. 284, 23 Fed. Cas. 116, 123, No. 13,466 (C. C. D. Maine), affirmed, 13 Wall. 531, Justice Clifford, on circuit, in applying the admissibility rule, relied upon Justice Story's decision in the *La Jeune* case, as well as upon Massachusetts (*Commonwealth* v. *Dana,* 2 Metc. 329) and English (*Legatt* v. *Tollervey,* 14

East 302; *Jordan* v. *Lewis,* 14 East 305 note) cases.[3]

B. The present federal rule of excluding illegally seized evidence applies only to evidence seized by federal officers in violation of the Fourth Amendment

The first break with the common law rule of admissibility came in 1886 when, in *Boyd* v. *United States,* 116 U. S. 616, this Court held that a statute requiring the production of books and papers in certain forfeiture cases and providing that failure to produce should constitute an admission of the government's allegations as to their contents, violated the prohibitions of the Fourth and Fifth Amendments against unreasonable searches and seizures and against compulsory self-incrimination. Chief Justice Waite and Mr. Justice Miller, concurring, expressed the view that the decision should have been based solely upon the immunity from compulsory self-incrimination, no search or seizure having been involved. This latter view of the case has been widely accepted. 8 Wigmore, Evidence (3d ed.) § 2264,

[3] For other cases applying the earlier Federal rule of admissibility see *United States* v. *Hughes*, 12 Blatch. 553, 26 Fed. Cas. 417 (C. C. S. D. N. Y.); *Bacon* v. *United States*, 97 Fed. 35, 40 (C. C. A. 8), certiorari denied, 175 U. S. 726; *Hardesty* v. *United States*, 164 Fed. 420 (C. C. A. 6); *Hartman* v. *United States*, 168 Fed. 30, 33–34 (C. C. A. 6); *Ripper* v. *United States*, 178 Fed. 24 (C. C. A. 8), rehearing denied, 179 Fed. 497, certiorari denied, 218 U. S. 680.

pp. 363–373; Fraenkel, *Concerning Searches and Seizures,* 34 Harv. L. R. 361; Harno, *Evidence Obtained by Illegal Search and Seizure,* 19 Ill. L. R. 303, 307.

In any event, beginning with this Court's decision in *Weeks* v. *United States,* (1914) 232 U. S. 383, federal courts have regularly excluded, upon timely motion, evidence obtained by federal officers in violation of the Fourth Amendment. The purpose and effect of the *Weeks* rule of exclusion is to add another sanction to the enforcement of the prohibition of the Fourth Amendment. Thus, this Court stated (pp. 393–394):

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. * * * To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

In the same *Weeks* case, this Court also held that evidence obtained by state officers through an illegal search and seizure was admissible in

a federal criminal proceeding. On this aspect of the *Weeks* case, it was said (p. 398):

> * * * As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the Amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court, under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal Government and its agencies. *Boyd Case,* 116 U. S., *supra,* and see *Twining* v. *New Jersey,* 211 U. S. 78.

This rationale of the *Weeks* case was applied in *Burdeau* v. *McDowell,* (1921) 256 U. S. 465, to hold admissible in a Federal criminal proceeding evidence wrongfully taken from the defendant by a private individual. Other decisions of the Court laid down the obvious qualification that evidence illegally seized by state officers is not admissible in federal proceedings if federal officers participated in the illegal search, or if the state officers were acting solely on behalf of the

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federal government, or, more generally, if the illegal search and seizure was actually a federal enterprise. *Byars* v. *United States,* 273 U. S. 28; *Gambino* v. *United States,* 275 U. S. 310.

The general rule of exclusion was thereafter applied in varying situations. Cf. *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385; *Amos* v. *United States,* 255 U. S. 313; *Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20. At no time, however, has this Court indicated that the exclusion rule extended to evidence secured by others than federal officers or persons acting solely on behalf of or in cooperation with federal officers. For example, Mr. Justice Brandeis, speaking for the Court in the *Gambino* case, where evidence was held inadmissible in a federal criminal prosecution because illegally secured by state officers acting "solely on behalf of the United States," said (275 U. S. at 317):

> The conclusion here reached is not in conflict with any of the earlier decisions of this Court in which evidence wrongfully secured by persons other than federal officers has been held admissible in prosecutions for federal crimes.

In *Olmstead* v. *United States,* 277 U. S. 438, it was held that evidence secured by wire-tapping, which concededly was illegal, was admissible in a federal criminal prosecution. Mr. Chief Justice

Taft, speaking for a majority of the Court, said (pp. 462, 463, 468):

> The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant. * * *
>
> *Gouled* v. *United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. * * *
>
> * * * * *
>
> Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numer-

> ous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.
>
> A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The rationale of the *Olmstead* decision was in no manner undermined or restricted by the later cases of *Nardone* v. *United States,* 302 U. S. 379, *Nardone* v. *United States,* 308 U. S. 338, and *Weiss* v. *United States,* 308 U. S. 321, which held that Section 605 of the Federal Communications Act had the effect of making evidence obtained by wiretapping inadmissible in federal criminal proceedings. In *Goldman* v. *United States,* 316 U. S. 129, 135–136, the Court followed the *Olmstead* case, expressly declining to overrule it.

This Court has several times reasserted and affirmed the principles established by the *Weeks* and *Burdeau* cases. For example, in *McGuire* v. *United States,* 273 U. S. 95, 99, the Court said, per Stone, J.:

> * * * A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule. The use by prosecuting officers of evidence illegally acquired by others does not necessarily violate the Constitution nor affect its admissibility. Cf. *Burdeau* v. *McDowell,* 256 U. S. 465; *Adams* v. *New York,* 192 U. S. 585; *Weeks* v. *United States,* 232 U. S. 383, 398.

And again, as recently as 1944, in *Feldman* v. *United States,* 322 U. S. 487, 492, it was said:

> And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, *Weeks* v. *United States, supra; Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau* v. *McDowell,* 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials.

The clearly established rule that evidence illegally seized by state officers, acting independently of federal officers, is admissible in federal criminal prosecutions, has been consistently followed in innumerable decisions in every circuit.[4]

This Court's decisions make it clear that the use against petitioner in a federal criminal proceeding of evidence obtained through an illegal search and seizure by state officers does not infringe his immunity from compulsory self-incrimination under the Fifth Amendment. The majority of this Court in the *Boyd* case based its decision on the prohibition of the Fifth Amendment against self-incrimination, as well as upon the Fourth Amendment (*supra,* p. 9). However, in 1904, this Court, distinguishing the *Boyd* case, held that the admission in evidence in a state

[4] Some typical cases, representing but a small fraction of the reported decisions, are *United States* v. *Diuguid*, 146 F. 2d 848 (C. C. A. 2), certiorari denied, 325 U. S. 857; *Miller* v. *United States*, 50 F. 2d 505, 507 (C. C. A. 3), certiorari denied, 284 U. S. 651; *Wheatley* v. *United States*, 159 F. 2d 599, 601 (C. C. A. 4); *Shushan* v. *United States*, 117 F. 2d 110, 117 (C. C. A. 5), certiorari denied, 313 U. S. 574, rehearing denied, 314 U. S. 706; *Lotto* v. *United States*, 157 F. 2d 623, 625–626 (C. C. A. 8), certiorari denied, 330 U. S. 811; *Butler* v. *United States*, 153 F. 2d 993, 994 (C. C. A. 10).

So far as we have been able to ascertain, the only federal case not following the rule is *Dukes* v. *United States*, 275 Fed. 142, 144–146 (C. C. A. 4). This case, however, was expressly overruled in *Kanellos* v. *United States*, 282 Fed. 461, 462 (C. C. A. 4).

criminal proceeding of the defendant's private papers seized by state officers did not violate his immunities against unreasonable searches and seizures or compulsory self-incrimination. *Adams* v. *New York,* 192 U. S. 585. As to the latter, the Court pointed out that (pp. 597–598):

> The Supreme Court of the State of New York, before which the defendant was tried, was not called upon to issue process or make any order calling for the production of the private papers of the accused, * * *. Nor do we think the accused was compelled to incriminate himself. He did not take the witness stand in his own behalf, as was his privilege under the laws of the State of New York. He was not compelled to testify concerning the papers or make any admission about them.

Mr. Justice Holmes, speaking for the Court in *Johnson* v. *United States,* 228 U. S. 457, 458, summed the situation up as follows:

> A party is privileged from producing the evidence but not from its production.

Although in *Weeks* v. *United States, supra,* the petitioner had asserted violation of his rights under both the Fourth and Fifth Amendments, this Court limited its consideration to the Fourth Amendment in approving the admission of the evidence obtained by the state officers. In the subsequent application by the federal courts of

the dual doctrine of the *Weeks* case,[5] the constitutional immunity against compulsory self-incrimination has been no obstacle.

Although the Fourth and Fifth Amendments are to some extent and in some contexts "intertwined" and "throw great light on each other" (*Feldman* v. *United States,* 322 U. S. 487, 489, 490; cf. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 208 ff.; but cf., also, dissenting opinion of Mr. Justice Black in the *Feldman* case, at 502–503), we submit that the present case does not involve the constitutional immunity against compulsory incrimination, or what has been referred to as "testimonial compulsion" (*Twining* v. *New Jersey,* 211 U. S. 78, 91), since petitioner was at no time compelled to testify or to produce evidence against himself. Cf. *People* v. *Defore,* 242 N. Y. 13, certiorari denied, 270 U. S. 657; *Dozier* v. *State,* 107 Ga. 708, 710, 33 S. E. 418. This, of course, is necessarily so. If obtaining evidence other than testimony from the defendant against his will is equivalent to compelling the defendant "to be a witness against himself," then not even a search valid under the Fourth Amendment will satisfy the command of the Fifth. 8 Wigmore, *Evidence,* p. 370.

[5] It should be observed that the *Weeks* rule of exclusion is limited to evidence secured in contravention of the Fourth Amendment. The Court has not extended the doctrine to evidence otherwise illegally secured by federal officers, as, for example, by trespass. *Hester* v. *United States,* 265 U. S. 57, opinion by Holmes, J.

The self-incrimination immunity of the Fifth Amendment expressly and directly controls judicial procedure, providing, as it does, that no person "shall be compelled in any criminal case to be a witness against himself." Cf. *Burdeau* v. *McDowell,* 256 U. S. 465, 475. The Fourth Amendment, on the other hand, does not deal with procedural or evidentiary matters, but rather asserts "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." Cf. *Harno,* op. cit., pp. 312–313; comment, *Search, Seizure and the Fourth and Fifth Amendments,* 31 Yale L. J. 518, 522. Thus, as distinguished from the use of subpoenas or other testimonial compulsion against a criminal defendant, the admission or exclusion of evidence illegally seized from him does not fall within the direct scope or wording of the constitution, but rather the rule of evidence comes into play only indirectly, as an implementation of the basic right, which the Fourth Amendment protects only against violation by federal officers, and not by state officers. *National Safe Deposit Co.* v. *Stead,* 232 U. S. 58, 71; *Bolln* v. *Nebraska,* 176 U. S. 83, 86; *Brown* v. *New Jersey,* 175 U. S. 172, 174; *McElvaine* v. *Brush,* 142 U. S. 155, 158; *Livingston* v. *Moore,* 7 Pet. 469, 551–552. In other words, the Fifth Amendment itself prohibits a federal court's receiving certain types of evidence; the Fourth Amendment

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merely prohibits legislative and executive invasion of a person's privacy, and the federal courts have adapted their procedure to help enforce this prohibition. Cf. 1 Greenleaf, *Evidence* (16th ed.) § 254a, p. 394.

II

THERE IS NO REASON IN LAW OR IN POLICY TO EXTEND THE WEEKS RULE OF EXCLUSION TO EVIDENCE ILLEGALLY SEIZED BY STATE OR MUNICIPAL OFFICERS

There is no reason in law or in policy to extend the exclusion doctrine[6] to embrace evidence illegally seized by others than federal officers, thus overruling the equally unequivocal holding of the

[6] The federal exclusion rule of the *Weeks* case has been the subject of much controversy. Wigmore has been the most vociferous and articulate critic of the rule. 8 Wigmore, *op. cit.*, §§ 2183, 2184, 2184a, 2184b; cf. § 2264; Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A. B. A. J. 479. See, also, Harno, *op. cit.;* Knox, *Self-Incrimination*, 74 U. of Penn. L. R. 139; Nelson, *Search and Seizure: Boyd vs. United States*, 9 A. B. A. J. 773. Among the literature on the other side of the *Weeks* argument, namely in support of the exclusion rule, are Cornelius, *Search and Seizure* (Second Edition), § 7–9, pp. 36–46; Fraenkel, *One Hundred and Fifty Years of the Bill of Rights*, 23 Minn. L. R. 719, 741–744 (reprinted with a supplement covering 1939 through 1944 by The American Civil Liberties Union); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. R. 361; Chafee, *The Progress of the Law, 1919–1922*, 35 Harv. L. R. 673, 694–704; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 Col. L. R. 11; Glenn, *Evidence Obtained by Illegal Search and Seizure*, 22 Ky. L. J. 63.

Weeks case that evidence illegally seized by state officers is admissible in federal criminal trials. As pointed out above, to hold evidence illegally seized by state officers without the cooperation of federal officers inadmissible in the federal courts would overturn long established principle and practice.

A. To exclude such evidence would penalize the federal Government for acts of persons over whom it had no control

The important policy considerations of those courts rejecting the *Weeks* exclusion rule have perhaps best been stated by Mr. Justice Cardozo in *People* v. *Defore,* 242 N. Y. 13, 23, 24, 25:

> We are confirmed in this conclusion [that illegally seized evidence is properly admissible] when we reflect how far-reaching in its effect upon society the new consequences would be. The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious. A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free. Another search, once more against the law, discloses counterfeit money or the implements of

forgery. The absence of a warrant means the freedom of the forger. Like instances can be multiplied. We may not subject society to these dangers until the Legislature has spoken with a clearer voice. * * * No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams[7] case strikes a balance between opposing interests.

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[7] The reference is to the opinion of the New York Court of Appeals in the *Adams* case, *People* v. *Adams*, 176 N. Y. 351, 363, where it was said: "The appellant in his final point argues that the court erred to the prejudice of the defendant in refusing to allow evidence as to the non-existence of a search warrant at the time the papers were removed from the office of defendant.

"We have already pointed out that the court will not take notice of the allegation that the possession of the papers offered in evidence on a criminal trial has been unlawfully acquired.

"It follows that the questions asked of the witness Cuff were immaterial. The fact that an officer, engaged in the search of defendant's office for papers, testified that there was a search warrant does not vary the situation."

In the *Weeks* case, this Court had held that the Fourth Amendment to the federal Constitution interdicted "the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises." (232 U. S. at p. 393). As pointed out by Mr. Justice Cardozo in *People* v. *Defore, supra,* at 23–24, in the majority of cases the practical effect of suppressing and/or returning illegally seized evidence is that the criminal goes free, to the serious detriment of society at large. It may be conceded that, as a matter of policy, it is quite reasonable and salutary that the interests of the federal Government in the punishment of criminals yield to the Government's interest in disciplining its own agents and officers in the performance of their duties under their oath to support the federal Constitution.

However, if this Court should now reverse its earlier decisions and hold inadmissible in federal prosecutions evidence obtained by state officers through an illegal search and seizure, there would

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In view of this, the statement of the Court in *Weeks* v. *United States, supra,* at 396, that "The decision in [the *Adams*] case rests upon incidental seizure made in the execution of a legal warrant * * *" is open to some question.

be no such beneficial result. State law enforcement officers are not subject to the control of the federal government. The law enforcement officers of the states range from highly trained full-time police to part-time constables and deputy-sheriffs with little, if any, legal knowledge. The federal government plainly is without authority to impose qualifications of training and temperament with respect to such local officers.

So it is that a local constable searching for stolen chickens could confer practical immunity for the most serious federal crimes, if the present rule were changed. Yet, there is nothing which the government could do to prevent such an illegal search or to prevent its repetition. Admitting the desirability of implementing and enforcing the Fourth Amendment at the cost of leaving an occasional criminal unpunished, we believe that to apply the rule of exclusion to this situation would accomplish nothing in preventing illegal searches and seizures. As said in *Feldman* v. *United States*, 322 U. S. 487, 492–493, "The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. * * * Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite

beyond the reach even of the most alert watchfulness by law officers of the Government."[8]

In this connection, the reasoning of Mr. Justice Brandeis in his famous dissenting opinion in the *Olmstead* case is significant. His view, and that of Mr. Justice Holmes, was that the Government, by making use of evidence obtained by the illegal acts (wire-tapping) of its own agents, was in effect ratifying such acts and would itself become a lawbreaker (pp. 480, 482, 483). Mr. Justice Brandeis (at 481) expressly distinguished *Burdeau* v. *McDowell, supra.* Certainly the doctrine of "ratification" cannot logically be extended to the illegal acts of persons whom the Government does not pay or employ or supervise.[9] By accepting evidence secured by strangers, the federal Government can hardly be said to make those persons its agents any more than it can be said to become a party to a crime by "ratification" when it presents the testimony of co-conspirators. Thus the doctrine of ratification would seem to be utterly inapplicable.

[8] It is not, therefore, necessary to go the whole way and urge, as do Mr. Justice Cardozo (*People* v. *Defore*, *supra*, at 21–22) and Wigmore (8 *Evidence*, p. 41), that all illegally seized evidence should be treated alike, irrespective of its source. It is quite consistent to exclude evidence illegally seized by federal officers, as a means of enjoining upon those officers the proper performance of their duties, while admitting evidence illegally obtained by others and made available to the federal Government without fault on its part.

[9] In his dissent in *Burdeau* v. *McDowell*, 256 U. S. at 476–477, Mr. Justice Brandeis did not purport to apply the principle of ratification.

B. No federal constitutional right of petitioner has been violated

1. *The Fourth Amendment is not involved.*— Here the illegal search and seizure were made by state officers. From *Barron* v. *Baltimore,* 7 Pet. 243, on, this Court has held that the Bill of Rights, i. e., the first eight amendments, "was for the protection of the individual against the federal government and that its provisions were inapplicable to similar actions done by the states." *Adamson* v. *California,* 332 U. S. 46, 51. It is enough to cite the *Adamson* case for the proposition that the Fourteenth Amendment does not make the Bill of Rights as such applicable to state action. In *Weeks* v. *United States, supra,* (p. 398), it was specifically held that the Fourth Amendment was not applicable to state officers, this Court declaring that "Its limitations reach the Federal Government and its agencies," citing *Twining* v. *New Jersey,* 211 U. S. 78. At the same term, in *National Safe Deposit Co.* v. *Stead,* 232 U. S. 58, 71, and in another context, it was held that the Fourth Amendment does not apply to the states.

Further, assuming that some principle analogous to "ratification" did come into play, the question would be: "What has been ratified?" The acts of the state or municipal officers may have been illegal, they may have violated the constitution of the state, but they did not conflict with

the Fourth Amendment of the United States Constitution, since the state officers' actions were not controlled by that amendment. The basic distinction between the search and seizure, which constitutes whatever violation of the defendant's rights has been perpetrated, and the admission of evidence must be kept in mind.[10] The conflict among the decisions appears to revolve around the various courts' judgments as to whether the admission of evidence illegally seized emasculates the applicable constitutional protection against unreasonable searches and seizures. This Court believes that the exclusion of evidence illegally seized by federal officers is necessary to make fully effective the protection of the Fourth Amendment. *Weeks* v. *United States, supra,* at 392. Other courts following the so-called federal rule similarly believe that the exclusion of evidence illegally seized by state officers is necessary to implement the search and seizure guaranties of the respective state constitutions. Those state courts adhering to the common law rule of admissibility believe that the exclusion of evidence is an indirect sanction for enforcing their consti-

[10] As one writer, in criticizing the federal exclusion rule of the *Weeks* case, has said: "We have, in these illegal seizure cases, overlooked the fact that when the evidence is brought to trial, the constitutional right is already violated, and excluding the evidence does not amend the violation nor effectively prevent its recurrence." Note, 22 Cornell L. Q. 585, 589.

tutional provisions which is neither demanded nor authorized by these provisions. *People* v. *Defore, supra; Commonwealth* v. *Wilkins,* 243 Mass 356, 138 N. E. 11; *State* v. *Lindway,* 131 Ohio St. 166, 2 N. E. 2d 490; *State* v. *Black, supra,* 5 N. J. Misc. 48, 50. The important point to bear in mind is that in all the cases, the issue relates to a rule of evidence.

2. *The privileges and immunities clause of the Fourteenth Amendment is not involved.*—This Court has never held that immunity against unreasonable searches and seizures is a privilege or immunity of citizens of the United States which is protected against violation by state officers by the Fourteenth Amendment. In fact, this Court specifically declined to determine that question in *Consolidated Rendering Co.* v. *Vermont,* 207 U. S. 541, 553, and in *Adams* v. *New York, supra,* at 594. In *Hague* v. *Committee for Industrial Organization,* 101 F. 2d 774, 787, the Circuit Court of Appeals for the Third Circuit held that the prohibition against unreasonable searches and seizures by federal officers contained in the Fourth Amendment was made applicable to state authorities by the Fourteenth Amendment. On certiorari, Mr. Justice Roberts, writing one of the opinions of the Court, expressly withheld approval of this holding by the circuit court of appeals, and declined to discuss or decide "the question whether exemption from the searches and seizures proscribed by the Fourth Amendment is

afforded by the privileges and immunities clause of the Fourteenth." *Hague* v. *C. I. O.*, 307 U. S. 496, 517.[11] None of the other opinions in the case mentions the search and seizure issue, and there is no indication of approval by any member of the Court of the gratuitous statement of the court of appeals.

We believe it clear that the immunity against unreasonable searches and seizures is not a privilege or immunity inherent in United States citizenship as such. *Slaughter-House Cases,* 16 Wall. 36; *Twining* v. *New Jersey,* 211 U. S. 78, 90–99; cf. opinion of Stone, J., in *Hague* v. *C. I. O.*, 307 U. S. at 519–521, particularly footnote 1, where the authorities are collected and discussed; and concurring opinion of *Frankfurter,* J., in *Adamson* v. *California, supra,* at 61–62. All the states provide immunity against unreasonable searches and seizures by state officers. Neither the original federal Constitution nor the Bill of Rights nor the Fourteenth Amendment created this right in the people. Cf. *Minor* v. *Happersett,* 21 Wall. 162; *Barron* v. *Baltimore,* 7 Pet. 243, 247–248. The only privilege or immunity of citizens of the United States possibly involved is that created by

[11] In *Reeve* v. *Howe*, 33 F. Supp. 619, 623 (E. D. Pa.), the court adopted the dictum of the circuit court of appeals in *Hague* v. *C. I. O.* The statement, however, was not necessary to the decision of the district court, which involved the suppression of evidence obtained by a search and seizure in which the court found that the federal Government had participated.

the Fourth Amendment, namely the immunity from unreasonable search and seizure by *federal officers.* We submit, therefore, that the privileges and immunities clause of the Fourteenth Amendment cannot possibly be deemed to incorporate the immunity against unreasonable searches and seizures contained in the Fourth Amendment.[12]

3. *There has been no denial of due process as guaranteed by the federal Constitution.*—The remaining question is whether the use against a defendant in a federal criminal proceeding of evidence obtained from him by an illegal search and seizure by state officers, violates the provisions of the Fifth or Fourteenth Amendments that no person shall be deprived of liberty without due process of law. At this point, it should be recalled that the Fourth Amendment is not applicable to state officers, and that in the instant case the illegally obtained evidence would be admissible in

[12] It should further be observed that on the present record it is at least doubtful whether petitioner could claim the protection of the privileges and immunities clause, since it is not clear from the record that he is a citizen of the United States. Cf. *Hague* v. *C. I. O.*, *supra.* He was born in England and then went to Austria (R. 86). He later came to the United States, but there is some indication that he then returned to Vienna (R. 87). The suggestion that in 1917 he was considered an American citizen (R. 86) is not substantiated, and the meager, confused facts elicited on his cross-examination do not provide any basis of plausibility of the existence of United States citizenship at that time. However, since he has been permitted to proceed *in forma pauperis* in this Court, we have not sought to question his United States citizenship.

the courts of New Jersey, whose officers made the search and seizure here involved. We think it clear that if the due process clause of the Fourteenth Amendment permits states which so desire to admit evidence obtained by an illegal search and seizure, then the due process clause of the Fifth Amendment permits the federal government to do so in cases to which the Fourth Amendment is not applicable.

This Court has repeatedly and recently held that whether a person has been denied due process of law does not depend upon whether the official action involved would be illegal under specific provisions of the federal Bill of Rights. *Adamson* v. *California,* 332 U. S. 46; *Palko* v. *Connecticut,* 302 U. S. 319; *Twining* v. *New Jersey,* 211 U. S. 78; *Maxwell* v. *Dow,* 176 U. S. 581; *Hurtado* v. *California,* 110 U. S. 516. In brief, the issue under the due process clause of the Fifth Amendment is whether the admission in a federal criminal proceeding of evidence obtained through a wrongful search and seizure by state officers, violates "the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut, supra,* at page 325, or "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government", *Twining* v. *New Jersey, supra,* at page 106.

At this point, it is of great significance that

not all Anglo-American jurisdictions subscribe to the general federal rule of exclusion of evidence obtained by wrongful search and seizure. From the earliest times,[13] it has been the accepted rule at common law that the legality of the means by which evidence was obtained was irrelevant to its admissibility in evidence. *Legatt* v. *Tollervey,* 14 East 302 (1811); *Jordan* v. *Lewis,* 14 East 305, note; *The Queen* v. *Granatelli,* 7 St. Tr. (N. S.) 979, 987 (1849). As early as 1723, this rule was applied in a criminal case to evidence secured by intercepting the mails. *Proceedings against Bishop Atterbury,* 16 St. Tr. 323, 495–496, 629–630 (1723). Cf. *The King* v. *Earbury,* 2 Barn. K. B. 346 (1733). Apparently, this has continued to be the English rule, *Elias* v. *Pasmore* [1934] 2 K. B. 164, despite the early and uncompromising condemnation of and relief against general warrants and unreasonable searches and seizures. Cf. *Entick* v. *Carrington,* 19 St. Tr. 1029 (1765); *Huckle* v. *Money,* 2 Wils.

[13] Although there have been some attempts made to trace the immunity from unreasonable searches and seizures back to the Magna Charta, there appears to be no justification for this view historically. Cf. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures*, 25 Col. L. R. 11, 14, where, concerning the Fourth and Fifth Amendments it is said: "Neither can be traced to Magna Charta except in a very faint and general way." See, also, Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (The Johns Hopkins Press, 1937), pp. 19–21.

K. B. 206 (1763); *Leach* v. *Money*, 3 Burr. 1692, 19 St. Tr. 1001.[14] The Canadian cases uniformly hold that evidence secured through illegal search and seizure is inadmissible.[15] As we have seen, the earlier federal cases upheld the admissibility of such evidence (*supra*, pp. 8–9).

The great weight of authority among the states, all having constitutional provisions granting immunity against unreasonable searches and seizures,[16] supports what is admittedly the com-

[14] Cf. *Adams* v. *New York*, 192 U. S. 585, 598: "The security intended to be guaranteed by the Fourth Amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted. But the English and nearly all of the American cases have declined to extend this doctrine to the extent of excluding testimony which has been obtained by such means, if it is otherwise competent."

[15] *Regina* v. *Doyle*, 12 Ont. R. 347, 353–355 (Queen's Bench Div.); *Rex* v. *Nelson*, 69 D. L. R. 180, 185 (Alberta Sup. Ct.); *Rex* v. *Gibson*, 30 Can. Cr. Cas. 308 (Alberta Sup. Ct.); *Rex* v. *Duroussel*, [1933] 2 D. L. R. 446 (Manitoba Ct. of App.); *Rex* v. *Lee Hai*, [1935] 3 D. L. R. 448, 450–451 (Manitoba Ct. of App.); *Rex* v. *Kostachuk*, 54 Can. Cr. Cas. 189, 191–192 (Saskatchewan Ct. of App.); *Rex* v. *Honan*, 20 Can. Cr. Cas. 10, 16 (Ont. Ct. of App.).

[16] The state guaranties are collected in Cornelius, *Search and Seizure* (2d ed.), § 2, fn. 14, pp. 8–11. Prior to 1939 the guaranty was purely statutory in New York (Sec. 8, Civil Rights Laws, c. 8), but it is now included in Article I, sec. 12, of the New York Constitution.

mon law rule of admissibility. Although there was some tendency among the states to change from the rule of admissibility to the rule of exclusion after this Court's decision in *Weeks* v. *United States, supra,* the majority remained in the admissibility column,[17] several states expressly rejecting the *Weeks* doctrine.[18] Since the state courts have vacillated somewhat on the question, no classification of the various jurisdictions remains valid for any length of time (cf. Atkinson, *Prohibition and the Doctrine of the Weeks Case,* 23 Mich. L. R. 748, 764). However, from time to time the cases have been collected and classified.

[17] Cf., for example, 88 A. L. R. 348–349 (1934): "It appears from the cases subsequent to the annotation in 52 A. L. R. 477 [1928], where a summary of jurisdictions revealed twenty-eight states following the rule of admissibility and sixteen following the rule of inadmissibility, that Pennsylvania and Vermont have definitely adopted the rule of admissibility, while South Dakota has changed to the rule of inadmissibility, and Washington, where the question had not been settled, has likewise adopted the rule of inadmissibility."

[18] See Andrews, *Historical Survey of the Law of Searches and Seizures,* 34 Law Notes 42, 46 (1930), where it is said that twenty-four states have squarely considered and rejected the federal rule of exclusion.

See, also, 22 C. J. S., § 657b, pp. 1006–1008: "In the absence of a provision in the organic or statutory law expressly rendering the evidence inadmissible, the rule in the majority of jurisdictions is that evidence obtained by an unlawful search and seizure in violation of constitutional or statutory provisions * * * is nevertheless admissible. This is the rule in some jurisdictions where formerly such evidence was incompetent against accused."

Cf., *inter alia,* 8 Wigmore, ***Evidence*** (3d ed.) §§ 2183, 2184, notes, pp. 5–34; Wharton's ***Criminal Evidence*** (11th ed.), § 373, notes, pp. 590–597; Cornelius, ***Search and Seizure*** (2d ed.), § 7, pp. 36–39; Atkinson, *op. cit.,* pp. 764–774; 22 C. J. S., § 657b, pp. 1006–1032; annotations, 24 A. L. R. 1411; 32 A. L. R. 408; 41 A. L. R. 1147; 52 A. L. R. 480; 88 A. L. R. 351; 134 A. L. R. 820; 150 A. L. R. 566; 5 Jones, ***Commentaries on Evidence*** (2d ed.), §§ 2075–2081, pp. 3865–3884.

Of particular relevance to the immediate problem, is the conflict among the states as to the admission in state criminal proceedings of evidence obtained through an illegal search and seizure by federal officers. As might be expected, states which follow the common law rule of admissibility with respect to evidence illegally obtained by state officers, also admit in state criminal proceedings evidence illegally seized by federal officers. Such is the rule, for example in Louisiana, Nevada, North Dakota and Pennsylvania.[19] Illinois, Tennessee and Montana, which exclude evidence illegally seized by state officers, admit evidence illegally seized by federal officers.[20] On

[19] *State* v. *Breaux*, 161 La. 368, 373–74, affirmed, *Breaux* v. *Louisiana*, 273 U. S. 645; *State* v. *Hebert*, 158 La. 210, 212; *Terrano* v. *State*, 59 Nev. 247; *Commonwealth* v. *Colpo*, 98 Pa. Super. 460, certiorari denied, 282 U. S. 863; *State* v. *Lacy*, 55 N. D. 83.

[20] *People* v. *Touhy*, 361 Ill. 332, certiorari denied, 303 U. S. 657; *Hughes* v. *State*, 145 Tenn. 544, 551; *Johnson* v. *State*, 155 Tenn. 628, 630; *State* v. *Gardner*, 77 Mont. 8; *State ex rel. Kuhr* v. *District Court*, 82 Mont. 515.

the other hand in Wyoming, Missouri and Kentucky, which also hold inadmissible evidence illegally seized by state officers, the admissibility of evidence secured by federal officers depends upon whether the search and seizure was violative of the Fourth Amendment to the federal constitution, on the ground that the states are bound by the federal constitution and it is part of the function of the state courts to enforce the federal constitution as the supreme law of the land.[21] Idaho and Mississippi, also "exclusion" states, have held evidence inadmissible when illegally obtained by federal officers, but it is not made entirely clear whether the legality of the search is to be tested by state law or federal law,

[21] *State* v. *Hiteshew*, 42 Wyo. 147, 292 Pac. 2; *State* v. *Rebasti*, 306 Mo. 336, 267 S. W. 858; *State* v. *Horton*, 312 Mo. 202, 278 S. W. 661, error dismissed, 271 U. S. 690; *Walters* v. *Commonwealth*, 199 Ky. 182, 187, 250 S. W. 839; *Roberts* v. *Commonwealth*, 206 Ky. 75, 266 S. W. 880; cf. *Ingram* v. *Commonwealth*, 200 Ky. 284, 254 S. W. 894; *Caudill* v. *Commonwealth*, 202 Ky. 730, 261 S. W. 253; *Vick* v. *Commonwealth*, 204 Ky. 513, 264 S. W. 1079.

Generally those states following the federal rule of exclusion also follow the rule of *Burdeau* v. *McDowell*, *supra*, admitting evidence illegally seized by private individuals. *Davidson* v. *Commonwealth*, 219 Ky. 251, 253, 292 S. W. 754; *Cutrer* v. *State*, 161 Miss. 710, 713, 138 So. 343; *State* v. *Steely*, 327 Mo. 16, 19, 33 S. W. 2d 938; *State* v. *Wilkerson*, 349 Mo. 205, 211–213, 159 S. W. 2d 794; *State* v. *Hepperman*, 349 Mo. 681, 697, 162 S. W. 2d 878. But cf. *Lowry* v. *State*, 42 Okla. Cr. R. 326, 276 Pac. 513, where evidence was held inadmissible because seized by mob action of private individuals while the defendant was in custody of state officials.

or both.[22] In Wisconsin, which excludes evidence illegally seized by state officers, the question of the admissibility in state criminal trials of evidence illegally obtained by federal officers, has been expressly left open.[23]

Although generally the state courts limit their discussions to the effect of the state constitutional provisions governing searches and seizures, a few have considered the due process question under the state and federal constitutions. The due process issue was fully discussed in *McIntyre* v. *State*. 190 Ga. 872, 878–879, 11 S. E. 2d 5, certiorari denied, 312 U. S. 695, where the Georgia court said:

> There are also many decisions by the Supreme Court of the United States and by the United States Circuit Courts of Appeals, involving trials in Federal courts, in which, although the 14th Federal amendment was not involved, the nature of the protection against unlawful searches and seizures and compulsory self-incrimination was considered and decided, and which seem clearly to recognize that such protection is not of "the very essence of a scheme of ordered liberty," or "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," under the test stated in the

[22] *Little* v. *State*, 171 Miss. 818, 822–823, 159 So. 103; *State* v. *Arregui*, 44 Ida. 43, 254 Pac. 788.

[23] *Novak* v. *State*, 185 Wis. 616, 618.

> Palko case, supra. While it is true that the Federal courts have applied in their own tribunals a rule, as to evidence obtained by Federal officers in violation of the 4th and 5th Federal amendments, different from that obtaining in this State with respect to evidence obtained by State officers and used in State-court trials, the Federal courts have nevertheless, even in cases tried in their own tribunals, consistently recognized that the Federal government may avail itself of evidence obtained by *State* officers, even though such evidence may have been obtained by unlawful search and seizure. These decisions draw the distinction, already stated, between the limitations of the 4th amendment in its different spheres of operation on the Federal government and the States.

Cf. *Johnson* v. *State,* 152 Ga. 271; *Hysler* v. *State,* 148 Ga. 409; *Martin* v. *State,* 148 Ga. 406, 407; *Groce* v. *State,* 148 Ga. 520; *Croft* v. *State,* 73 Ga. App. 318, 321; *Griggs* v. *State,* 29 Ga. App. 212 (headnote).

The applicability of the due process concept was also fully considered in *People* v. *Gonzales,* 20 Cal. 2d 165, 169, 124 P. 2d 44, certiorari denied, 317 U. S. 657, where the court said:

> Defendants contend, however, that the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any

person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the Federal Constitution, however, fall within the concept of due process of law. * * * In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. * * * While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a

> confession obtained by coercion or torture * * * *, it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. * * * The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. * * * The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence."

Cf. *People* v. *Kelley,* 122 P. 2d 655, 659–660 (Cal. App.), affirmed, 22 Cal. 2d 169, 137 P. 2d 1, appeal dismissed, 320 U. S. 715, rehearing denied, 321 U. S. 802; *City of Columbus* v. *Smith,* 78 Ohio App. 66, 65 N. E. 2d 716, followed in *City of Columbus* v. *Meadley,* 78 Ohio App. 490, 65 N. E. 2d 719, and *City of Columbus* v. *Treadwell,* 65 N. E. 2d 720, 722; *Banks* v. *State,* 207 Ala. 179, 93 So. 293, certiorari denied, *Ex parte Banks,* 207 Ala. 503, 93 So. 472, certiorari denied, 260 U. S. 736.

In construing the "due process" concept, early British experience is of special relevance (*Crane* v. *Hahlo,* 258 U. S. 142, 147), particularly where,

as here, the British rule has been widely adopted in the United States (*Powell* v. *Alabama,* 287 U. S. 45, 65; *Tumey* v. *Ohio,* 273 U. S. 510, 523). As we have seen (*supra,* p. 31), the "solicitous care of English courts concerning the 'liberty of the subject'" (Frankfurter, J., dissenting in *Harris* v. *United States,* 331 U. S. 145, 170) permits the introduction of illegally seized evidence in criminal trials. Similarly, in construing the guaranties of the federal constitution with respect to searches and seizures, the views of the Massachusetts court are of special significance because the Massachusetts provision is the forerunner of the Fourth Amendment[24] (*Ibid.,* p. 161). *Commonwealth* v. *Dana,* 2 Metc. (Mass.) 329, is generally referred to as the leading early American case establishing the rule of admissibility. In 1923, in *Commonwealth* v. *Wilkins,* 243 Mass. 356, 138 N. E. 11, the Supreme Judicial Court of Massachusetts reconsidered the interpretation of its constitutional provision in the light of this Court's decision in the *Weeks* case, and unani-

[24] For a discussion of the American precursors of the Fourth Amendment, see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (The Johns Hopkins Press, 1937), pp. 79 ff., 82: "Massachusetts was next in line with Article 14 of the Declaration of Rights of 1780. Its more elaborate wording was not taken from any of the other constitutions and offered the first expression of the phrase 'unreasonable searches and seizures' which ultimately found its way into the Fourth Amendment."

mously reaffirmed its established rule of admissibility. And later in the same year, again by a unanimous court speaking through Chief Justice Rugg, the Massachusetts court held that the admission in evidence of illegally seized liquor did not violate the defendant's rights under the due process clause of the Fourteenth Amendment to the federal Constitution. *Commonwealth* v. *Donnelly,* 246 Mass. 507, 141 N. E. 500, certiorari dismissed, 267 U. S. 603. The court referred to the earlier opinion of Mr. Justice Holmes in *Commonwealth* v. *Welch,* 163 Mass. 372, 40 N. E. 103, announcing the admissibility rule.

The New York experience is also illuminating. Cf. Frankfurter, J., dissenting in the *Harris* case, *supra,* at 160. Prior to 1939, New York was alone among the states in having no constitutional guaranty against unreasonable searches and seizures, its corresponding guaranty being merely statutory. In the course of its deliberations, the New York Constitutional Convention, which prepared the new state constitution containing a guaranty against unreasonable searches and seizures, after much debate, rejected a proposal that the new constitution specifically provide that:

> Any evidence secured or obtained in violation of this section shall be inadmissible upon any trial, civil or criminal, or in any proceeding whatsoever.

The New York Court of Appeals, in an opinion by Chief Judge Lehman reviewing the history of

the rule in New York, held that the rule of admissibility remains intact under the new constitution. *People* v. *Richter's Jewelers,* 291 N. Y. 161, 51 N. E. 2d 690. To the same effect are *People* v. *LaCombe,* 170 Misc. 669, 9 N. Y. Supp. 2d 877; *People* v. *Kuhn,* 172 Misc. 1097, 15 N. Y. Supp. 2d 1005.

It should also be noted that New Jersey, which has consistently admitted evidence obtained through illegal search and seizure (*supra,* p. 3 n. 1), has recently put into effect its new constitution in which the search and seizure provision is phrased exactly as in its former constitution. Thus, in recent years, the people of two states have revised their constitutions without feeling obliged by their sense of fair play and "ordered liberty" to provide for the exclusion of evidence obtained by illegal searches and seizures.

We submit that the fact that so many jurisdictions over such a long period of time, have, after examining the matter, decided that evidence illegally seized can be admitted in criminal prosecutions, in itself demonstrates that its admission does not violate due process of law.[25] The tradition of Anglo-American jurisprudence is itself of the essence of the concept of due process. It

[25] If, as has been held by this Court, a person may, consistent with the federal constitution, be tried in a criminal case after having been brought into the state of trial by illegal abduction, it can hardly be said that merely introducing evidence illegally seized from a criminal defendant vio-

is hardly conceivable that any rule which had secured the repeated and well-considered approval of so many eminent British and American jurists, in practically every area of the English speaking world, could now be considered a violation of a right which is "of the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut, supra,* at 325. We are aware of no case in which this Court has held to be a violation of due process of law any procedure which had been so widely approved and so deeply rooted in the fabric of law and in the mores of so many states, all with their own historical heritages of constitutionally guaranteed liberties. That the federal government and some states adopt stricter rules to implement specific rights of their citizens certainly does not establish that ordered society, with proper respect for human dignity and decency, could not exist without the more rigid rules. The following language of the Court in *Twining* v. *New Jersey, supra,* 211 U. S. at 113–114, though concerned with the privilege against compulsory self-incrimination, is fully relevant here:

> There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege

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lates his "natural rights." *Ker* v. *Illinois*, 119 U. S. 436, 444; *Mahon* v. *Justice*, 127 U. S. 700, 715; *Cook* v. *Hart*, 146 U. S. 183; *Lascelles* v. *Georgia*, 148 U. S. 537, 543; *Pettibone* v. *Nichols*, 203 U. S. 192, 208. Cf. *Adams* v. *New York*, 192 U. S. at 596.

> within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that State made the same ruling.

If, as we believe is so, it does not violate due process of law for a state court to admit relevant and competent evidence obtained by an illegal search and seizure by officers of the same state, *a fortiori* there can be no sound reason for depriving the federal government of the use of such evidence, secured without complicity or wrongdoing by the federal government. It would be most anomalous to hold that evidence admissible in the courts of the jurisdiction whose own officers had violated a party's rights was inadmissible in the courts of a separate jurisdiction whose officers were entirely innocent of any wrongdoing.

The rationale of this Court in the *Weeks* case and in subsequent cases excluding illegally seized

evidence does not require or tend to support such a conclusion. As we read the cases, the federal exclusion rule appears to be based on the grounds (1) that, as a matter of ethics, the Government should not be permitted to avail itself of the fruits of the wrongdoing of its own servants and agents, and (2) that the exclusion of the evidence is the only really effective means of implementing the protection assured by the Fourth Amendment.[26] Neither ground has any relevance to the problem here under consideration.[27] First, the injury, i. e., the search and seizure which constituted whatever invasion of petitioner's rights there may have been, was not the act of any federal agent.[28] As to the

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[26] In *Goldstein* v. *United States*, 316 U. S. 114, 120, this Court explained the basis of the *Weeks* exclusion rule as follows: "It has long been settled that evidence obtained in violation of the prohibition of the Fourth Amendment cannot be used in a prosecution against the victim of the unlawful search and seizure if he makes timely objection. This, for the reason that otherwise the policy and purpose of the amendment might be thwarted."

[27] Atkinson, *op. cit.*, p. 33, 23 Mich. L. R. 748, has said: "The holding may be justified upon two theories, *viz.*, (1) that the admission of the evidence substantially violates the rule against self-incrimination in the Fifth Amendment, (2) that the exclusion of the evidence is the only practical means of enforcing the guarantee against unreasonable searches and seizures." As we have shown above, however, the Fifth Amendment guaranty against testimonial compulsion is not involved.

[28] We concede, of course, that if the Court should determine that there was such participation by a federal officer as to make the search and seizure a joint federal-state enterprise, the evidence was inadmissible.

function of the exclusion rule as an implementation of the Fourth Amendment, it is sufficient to repeat that the Fourth Amendment is not here involved. The Fourth Amendment inhibits unreasonable searches and seizures only by federal officers. Whatever rights of petitioner may have been violated by the search and seizure were not rights secured by the Fourth Amendment.

At this point the argument might be made that the search and seizure violated petitioner's rights under the due process clause of the Fourteenth Amendment, and the evidence secured thereby should be excluded as a means of implementing this constitutional guaranty. We submit, however, that there is no warrant for so extending the rule of exclusion. As previously noted, this Court has never held that the immunity against unreasonable searches and seizures is an element of due process. That it is a right sufficiently important to be specifically protected against state invasion by state constitutions and against federal invasion by the federal constitution does not render it necessarily a "natural right of man." Cf. *Twining* v. *United States, supra,* at 99 ff.; *Palko* v. *Connecticut, supra; Adamson* v. *California, supra,* at 54–55; state cases discussed *supra,* pp. 37–40.

Further, we submit that even if the immunity were to be considered one of the elements in the concept of due process of law, the exclusion of

evidence acquired in disregard of the immunity should not follow. The violation of due process of law was not the act of the federal government; yet the public interest of the federal government would be the sufferer if the evidence were excluded. When state and municipal officers secure evidence, they are not motivated by the probability or possibility of securing evidence of federal crimes. Thus, to announce a rule of exclusion of state-secured evidence in federal prosecutions would not tend to deter similar acts by state and municipal officers in the future. The only practical result of such a rule would be that in many cases, often critical ones, in which state and municipal officers discovered evidence of federal offenses which federal officers had not yet unearthed, federal rights could never be vindicated and guilty persons would go unpunished, free to prey on the community.

Manifestly, the admission of the evidence *per se* does not constitute a violation of due process of law within the ambit of the Fifth Amendment, and it is only in presenting the evidence, innocently come by, that the federal Government is involved. If due process is involved at all, it is only at the time of the search and seizure. Since the search and seizure was by state officers, the only due process clauses conceivably relevant

would be those of the Fourteenth Amendment and of the state constitution. Neither of these, however, controls the action of federal officers. Although the privilege against self-incrimination is not involved in this case (*supra*, pp. 16–20), we believe the rationale of the *Feldman* case, *supra*, is fully applicable in the present situation. In his dissenting opinion, Mr. Justice Black said (p. 498):

> The very narrow problem thus presented, and upon which this Court never before has passed, is whether federal courts can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will.

This question the majority of the Court answered in the affirmative. If we substitute the simple word "evidence" for the phrase "self-incriminatory testimony" in the question stated by Mr. Justice Black, we cover the problem of the instant case. We submit that the Court's affirmative answer in that case is *a fortiori* proper here.

CONCLUSION

For the reasons stated, we submit that the legality of the search and seizure, being a totally non-federal enterprise, is irrelevant to the admissibility of the evidence secured thereby

in the federal criminal prosecution. Accordingly, the judgment of the Court of Appeals should be affirmed.

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